In the

United States Court of Appeals

For the Seventh Circuit

No. 11717

REFRIGERADORA DEL NOROESTE, S. A.,
Plaintiff-Appellee,

vs.

HENRY APPELBAUM, DOING BUSINESS AS PENGUIN FROZEN FOODS,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

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1 Pleas had at a regular term of the United States District Court for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of June (it being the 6th day thereof) in the Year of Our Lord One Thousand Nine Hundred Fifty-Five and of the Independence of the United States of America, the 179th Year.

Present:

Honorable John P. Barnes, Chief Judge.
Honorable William H. Holly, District Judge.
Honorable Philip L. Sullivan, District Judge.
Honorable Michael L. Igoe, District Judge.
Honorable William J. Campbell, District Judge.
Honorable Walter J. La Buy, District Judge.
Honorable J. Sam Perry, District Judge.
Honorable Win G. Knoch, District Judge.
Honorable Julius J. Hoffman, District Judge.
Roy H. Johnson, Clerk.
William W. Kipp, Sr., Marshal.

Wednesday, June 15, 1955.

Court met pursuant to adjournment.

Present: Honorable William J. Campbell, Trial Judge.

2 Pleas had at a regular term of the United States District Court for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of February (it being the 6th day thereof) in the Year of Our Lord One Thousand Nine Hundred Fifty-Six and of the Independence of the United States of America, the 180th Year.

Present:

Honorable John P. Barnes, Chief District Judge.
Honorable William H. Holly, District Judge.
Honorable Philip L. Sullivan, District Judge.
Honorable Michael L. Igoe, District Judge.
Honorable William J. Campbell, District Judge.
Honorable Walter J. La Buy, District Judge.
Honorable J. Sam Perry, District Judge.
Honorable Win G. Knoch, District Judge.
Honorable Julius J. Hoffman, District Judge.
Roy H. Johnson, Clerk.
William W. Kipp, Sr., Marshal.

Friday, February 10, 1956.

Court met pursuant to adjournment.

Present: Honorable William J. Campbell, Trial Judge.

3 IN THE UNITED STATES DISTRICT COURT

Northern District of Illinois,

Eastern Division.

Refrigeradora del Noroeste, S.A., a Mexican corporation, *Plaintiff,* *vs.* Henry Appelbaum, doing business as Penguin Frozen Foods, *Defendant.*	Civil Action No. 53 C 2482

STATEMENT IN ACCORDANCE WITH RULE 10(b) OF THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

1. Time of commencement of suit: December 31, 1953.
2. Original parties: Refrigeradora del Noroeste, S.A.,

a Mexican corporation, plaintiff, and Henry Appelbaum, doing business as Penguin Frozen Foods, defendant.

3. Complaint filed December 31, 1953; answer and counterclaim February 25, 1954; reply March 17, 1954; amended answer and counterclaim November 10, 1954; motion to strike portion of amended answer and counterclaim November 23, 1954; reply to amended answer and counterclaim January 28, 1955.

4. Trial had before Judge William J. Campbell on June 7, 8, 9, 10, 13, 14 and 15, 1955.

5. The jury failed to reach a verdict at the close of the trial on June 15, 1955, and was discharged without reaching a verdict.

6. Final judgment was entered upon plaintiff's motion for directed verdict on February 10, 1956.

7. Notice of appeal was filed February 20, 1956.

Robert A. Sprecher,
100 West Monroe Street, Chicago, Ill.,
Attorney for Defendant.

4 IN THE UNITED STATES DISTRICT COURT.
• • (Caption 53-C-2482) • •

Be It Remembered, that on to wit, the 31st day of December, 1953, the above-entitled action was commenced by the filing of the Complaint in the office of the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, in words and figures following, to wit:

5 IN THE UNITED STATES DISTRICT COURT.
• • (Caption—53-C-2482) • •

COMPLAINT.

Plaintiff, Refrigeradora del Noroeste, S. A., by its attorneys, Miles G. Seeley, Louis A. Kohn and Cornelius B. Kennedy, complains of the defendant, Henry Appelbaum, doing business as Penguin Frozen Foods, and says that:

1. Plaintiff is a corporation organized and existing under the laws of the Republic of Mexico, having its principal office in Mazatlan, Sinaloa, Mexico, and is a citizen of that nation. At all times hereinafter mentioned, plaintiff was engaged in the business of catching, purchasing, packing, freezing and selling fresh shrimp.

2. Defendant Henry Appelbaum is a citizen of the State of Illinois, residing in the Village of Winnetka, in that State. At all times hereinafter mentioned, defendant was engaged in the business of selling and distributing shrimp in the United States of America and in Canada under the trade name and style of "Penguin Frozen Foods", with his principal place of business in Chicago, Illinois.

3. The matter in controversy exceeds the sum of Three Thousand Dollars ($3,000), exclusive of interest and costs, and the jurisdiction of this court is invoked under 28 U. S. C. Sec. 1332(a)(2).

4. On or about July 22, 1952 plaintiff and defendant entered into a written agreement providing for the shipment by plaintiff of frozen shrimp to defendant for the
6 period from August 15, 1952 to August 15, 1954, payment to be made therefor by defendant at the rate of 95% of the amount received from the sale thereof by defendant (or 93% in the event that financing was furnished by defendant) and the remaining provisions being the applicable terms and provisions of an agreement between plaintiff and Penguin Frozen Foods, Inc. dated October 19, 1950.

5. Plaintiff has delivered to defendant the shrimp required to be delivered by it prior to October 20, 1953, including eight carloads of shrimp aggregating approximately 341,914 pounds of varying sizes and types delivered during June, July and August, 1953. All other conditions precedent required to be performed by plaintiff or to occur prior to said date have been performed by plaintiff or have occurred.

6. Prior to October 20, 1953 defendant failed and refused to pay plaintiff for shrimp delivered by it to defendant, and further failed and refused to pay plaintiff the additional sums owing it on account of shrimp delivered by plaintiff and sold by defendant, as required under the provisions of the agreement entered into on or about July 22, 1952, notwithstanding plaintiff's demands for payment of the amounts due it.

7. On October 20, 1953, plaintiff advised defendant that because of his failure to discharge his obligations under said agreement, plaintiff would refuse to make any further shipments of shrimp to him. Plaintiff also demanded the return of the unsold shrimp remaining in the possession of defendant.

8. Although plaintiff has demanded payment of the

sum due it and the return of shrimp remaining unsold, no part of said sum has been paid and none of said shrimp have been returned.

Wherefore plaintiff demands judgment in its favor for Two Hundred Fifty Thousand Dollars ($250,000), to-
7 gether with interest as provided by law, and its costs herein.

Refrigeradora del Noroeste, S.A.,
Plaintiff,
By its attorneys,
Miles G. Seeley,
Louis A. Kohn,
Cornelius B. Kennedy,
231 South LaSalle Street,
Chicago 4, Illinois,
STate 2-0600.
Mayer, Meyer, Austrian & Platt,
Of Counsel.

• • • • •

17 And afterwards on, to wit, the 25th day of Febru-
ary, 1954 came the Defendant by his attorneys and filed in the Clerk's office of said Court his certain Answer and Counterclaim in words and figures following, to wit:

18 IN THE UNITED STATES DISTRICT COURT.
• • (Caption—53-C-2482) • •

ANSWER AND COUNTERCLAIM.

Answer.

Henry Appelbaum, doing business as Penguin Frozen Foods, defendant, by his attorneys, answers the complaint of Refrigeradora del Noroeste, S. A., plaintiff, as follows:

1. Defendant admits the allegations of paragraph 1 of the complaint.

2. Defendant admits the allegations of paragraph 2 of the complaint.

3. Defendant admits the allegations of paragraph 3 of the complaint.

4. Defendant admits the allegations of paragraph 4 of the complaint.

5. Defendant denies that plaintiff delivered to defendant the shrimp required to be delivered by plaintiff prior to October 20, 1953, and denies that the plaintiff has performed all other conditions precedent required to be performed by the plaintiff. Defendant admits that plaintiff delivered eight carloads of shrimp during June, July and August, 1953, but defendant avers that said shrimp were defective in quality and quantity in violation and breach of the agreements between the plaintiff and defendant.

6. Answering paragraphs 6, 7 and 8, and further answering the entire complaint, defendant avers that despite the agreements between the plaintiff and defendant dated October 19, 1950, and July 22, 1952, whereby plaintiff agreed to sell and deliver all shrimp caught or purchased and packed and frozen by plaintiff during the period from August 16, 1952, to August 15, 1954, plaintiff without justification: (a) repudiated and breached said agreements by written statements to the defendant dated February 25, 1953, August 20, 1953, August 24, 1953, September 7, 1953, and other written and oral statements and by plaintiff's actions, and (b) by plaintiff's voluntary affirmative acts in agreeing with others to sell its shrimp in the United States in violation and breach of its agreements with defendant, plaintiff rendered performance of its agreements with defendant impossible.

7. The violations, breaches and repudiations of its agreements with the defendant by the plaintiff, as described in paragraphs 5 and 6 hereof, damaged and injured the defendant in excess of the sum of $250,000.

Wherefore, defendant prays that the complaint herein be dismissed at the cost of the plaintiff.

Counterclaim.

1. Defendant realleges his admissions and averments contained in paragraphs 1 through 6 of his answer herein.

2. Defendant further alleges that the violations, breaches and repudiations by the plaintiff of its agreements with the defendant injured and damaged the defendant in the amount of $350,000.

Wherefore, defendant demands judgment in his favor upon his counterclaim for Three Hundred Fifty Thousand

Dollars ($350,000) together with interest as provided by law and the costs herein.

Henry Appelbaum, doing business as
Penguin Frozen Foods,
By Stanford Clinton,
134 N. LaSalle St.,
DEarborn 2-0525,
By Robert A. Sprecher,
100 W. Monroe,
RAndolph 6-2632.

Of Counsel:
Pritzker, Pritzker & Clinton,
Crowley, Sprecher and Weeks.

• • • • •

22 And afterwards on, to wit, the 17th day of March, 1954 came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Reply in words and figures following, to wit:

23 IN THE UNITED STATES DISTRICT COURT.
• • (Caption—53-C-2482) • •

REPLY.

Plaintiff, Refrigeradora Del Noroeste, S. A., by its attorneys, Miles G. Seeley, Louis A. Kohn and Cornelius B. Kennedy, for reply to the answer and counterclaim of Henry Appelbaum, doing business as Penguin Frozen Foods, says that:

1. For reply to paragraph 5 of the answer, incorporated by reference in paragraph 1 of the counterclaim, it denies that the shrimp delivered by it to defendant during June, July and August, 1953, were defective in quality and quantity.

2. It denies the averments contained in paragraph 6 of the answer, incorporated by reference in paragraph 1 of the counterclaim.

3. It denies the averments contained in paragraph 2 of the counterclaim.

Refrigeradora Del Noroeste, S. A.,
By its Attorneys,
Miles G. Seeley,
Louis A. Kohn,
Cornelius B. Kennedy,
231 South La Salle Street,
Chicago 4, Illinois,
STate 2-0600.
Mayer, Meyer, Austrian & Platt,
Of Counsel.

* * * * *

26 And afterwards on, to wit, the 9th day of September, 1954 came the Defendant by his attorneys and filed in the Clerk's office of said Court his certain Interrogatories Propounded To Plaintiff Under Rule 33 Of The Federal Rules Of Civil Procedure in words and figures following, to wit:

27 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—53-C-2482) * *

INTERROGATORIES PROPOUNDED BY DEFENDANT TO PLAINTIFF UNDER RULE 33 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

1. How many pounds of shrimp of all kinds and qualities classified according to size, grade and other classification, were caught or purchased and packed and frozen by Refrigeradora del Noroeste during the period since Car PFE 7754 was shipped to Penguin Frozen Foods on or about July 30, 1953, up to and including August 15, 1954?

2. How many pounds, if any, of the shrimp described in interrogatory 1, classified according to size, grade and other classification, were processed by Refrigeradora del Noroeste but not owned by Refrigeradora del Noroeste?

3. How many pounds, if any, of the shrimp described in interrogatory 1, classified according to size, grade and other classification, were sold by Refrigeradora del Noroeste for consumption in the Republic of Mexico?

4. How many pounds of the shrimp described in interrogatory 1 less the pounds of shrimp, if any, described in interrogatories 2 and 3, classified according to size, grade and other classification, have been sold; how many pounds,

classified according to size, grade and other classifica-
28 *tion, have been consigned;* how many pounds, classified according to size, grade and other classification, have been delivered upon trust receipt; and how many pounds, classified according to size, grade and other classification, have been disposed of in any other method, described such method?

5. What are the names and addresses of all of the persons to whom the shrimp described in interrogatory 1 has been sold or disposed of by consignment, delivery upon trust receipt or other method, and how many pounds, classified according to size, grade and other classification, have been disposed of to each such person and by what method?

6. How many pounds of the shrimp described in interrogatory 4, classified according to size, grade and other classification, have been resold or otherwise disposed of by the persons named in the answer to interrogatory 5 and at what price or prices?

7. How many pounds of the shrimp described in interrogatory 4, classified according to size, grade and other classification, remain unsold or undisposed of by the persons named in the answer to interrogatory 5, what sale or resale price or prices were billed or invoiced by Refrigeradora Noroeste in regard to all such pounds and what is the current market price for each such size, grade and classification?

8. Did Pedro Pinson and Oscar Fraustro, directors of Refrigeradora Noroeste, or either of them, receive a copy of the letter attached to these interrogatories as Exhibit "A" and, if so, when?

9. What is the exact legal relationship between Refrigeradora Noroeste and Nacional Financiera?

10. Who were the directors of Refrigeradora Noroeste on October 19, 1950, and who are the directors at the present, showing the dates and names of all intervening changes?

29

Henry Appelbaum, doing business as
Penguin Frozen Foods,
By Stanford Clinton,
134 N. La Salle St., DE 2-0525,
By Robert A. Sprecher,
100 W. Monroe St., RA 6-2632.

Of Counsel:
Pritzker, Pritzker & Clinton,
Crowley, Sprecher and Weeks.

30 Exhibit A.

I think it would be wise to give you a report on the progress made by the organization of Crest Importing Co.

Naturally all other phases of the organization are secondary to the marketing and merchandising program. For the past week I have been in Chicago endeavoring to set up outlets for distribution so that when the new season commences we will be fully prepared. To prevent a lengthy trip through the United States, I asked all of the buyers and sub-brokers with whom I intend to work, to meet me in Chicago. Our program is now well established and I anticipate no difficulty in the marketing of our product.

I would like to explain the function of the sub-broker. The sub-broker in effect acts as one of our employees selling at our direction and at prices set by ourselves. He is paid a commission of 2½%. I have found that it is usually cheaper to work through a sub-broker than to maintain salesmen in each major market. The sub-broker at the same time he is selling our product is selling other commodities. Accordingly he would have a distinct advantage over us should we elect at first to use our own salesmen.

We will have arrangements in some areas where we will sell direct, and not use a broker. However, in those instances, a large distributor must be given a preferential price, usually equal to the normal sub-brokerage. It is obvious that a distributor will not pay $20,000 to $30,000 for a whole car, and pay the same price that the small buyer pays for five to ten cases. With the present high prices, it is very difficult to find anyone who will buy in large quantities, most buyers preferring to buy in small quantities instead of tying up considerable money in an inventory.

I do not believe it possible for anyone to sell properly by telephone throughout the whole country and know that the carrying of spot stocks in key areas, with sales at premium prices by the sub-broker is the most efficient method and the most profitable for the producer.

Now, frankly, I am quite concerned and disturbed to find that there is a possibility the contract of Refrigeradora with Penguin might extend for another year.

I know the firm is not too highly regarded in the industry and do not believe that they have either the experience or contacts necessary to do a good job. For example, all of the other producers have long since been liquidated for

last year's production. They did not end up at the end of the year with a large unsold inventory of small sizes on a declining market, and at a time when small sizes are most abundant. Obviously, the carrying of this inventory has greatly increased your storage costs and interest
31 charges. Of most importance, however, is the fact that all the small sizes should have been sold at prices at least ten cents a pound higher than the present market.

I have made brokerage arrangements with highly reputable firms and know that many of them would refuse to work with that firm.

I believe that Refrigeradora had a bad experience with another Chicago firm or Stamm Schulman. These gentlemen formerly worked for Morris Fisheries. The owner of Penguin also worked for Morris Fisheries prior to organizing Penguin. I do not know what the contractual relationship is between Reno and Penguin but if the former contract provided for cancellation, the withholding of funds by Penguin to assure extension of the contract seems to be very illegal and very close to blackmail. I would not be at all desirous of having this firm receive any merchandise or money belonging to Crest. I feel a keen responsibility to all of you gentlemen as well as the other organizers of Crest, and am sure you can appreciate the apprehension I would have in entrusting funds or merchandise in view of Penguin's attitude on this matter.

I do not believe Penguin would agree to confine their sales to Chicago. I am sure also that their efforts, instead of building Crest to a larger organization would be directed towards blocking our aims and growth. I fail to see how Penguin can be anything but a great handicap, an additional expense, and a source of friction, and sincerely hope that the first year we will not be burdened with the problem of working with them in any way. I believe that relations with Penguin should be severed. If there is any assistance I can give you, I will be glad to do so.

Sincerely,

/s/ J. W. Willis.

32 And afterwards on, to wit, the 16th day of September, 1954 came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Notice, And Objections To Interrogatories in words and figures following, to wit:

• • • • •

35 IN THE UNITED STATES DISTRICT COURT.
• • (Caption—53-C-2482) • •

OBJECTIONS TO INTERROGATORIES.

Plaintiff makes the following objections to the interrogatories served on September 8, 1954 by defendant on plaintiff.

Objections to Interrogatories 1 through 10 are as follows:

Interrogatories 1 through 7. Trial is set for October 4, 1954. Under Rule 33 of the Federal Rules of Civil Procedure, plaintiff is obliged to answer defendant's interrogatories by September 23, 1954. Interrogatories 1 through 7 require that plaintiff undertake expensive and burdensome compilations and computations. In the time available to plaintiff to prepare for trial, it would be oppressive for it to devote time and effort to the task of answering
36 defendant's interrogatories. This case was commenced on December 31, 1953. Extensive depositions were taken of both parties on May 6 and 7, 1954, and plaintiff's manager was questioned at length by attorneys for defendant at that time. Nevertheless defendant has not seen fit to serve interrogatories until September 8, 1954.

Moreover, interrogatories 1 through 7 deal exclusively with the question of damages which defendant asserts under his counterclaim. Such interrogatories are relevant only if the defendant is entitled to recover damages. Answers should not be required now before there is any ruling that defendant has established its cause of action. Said interrogatories have no other relevance whatever to the issues in this case, and matters bearing upon damages should be deferred until the validity of defendant's claim is determined.

Interrogatory 8. Interrogatory 8 refers to a document marked "Exhibit A" attached to defendant's interrogatories. "Exhibit A" is an incomplete document. "Exhibit A" bears no date, and contains no indication whatever of the addressee or addressees. Under these circumstances plaintiff should not be required to answer Interrogatory 8 unless more information is specified.

Interrogatory 9. Interrogatory 9 calls for a legal conclusion and opinion, and does not ask for any factual informa-

tion. Moreover, plaintiff's manager in his depositions
37 was questioned at great length concerning this matter (Deposition of Pedro Pinson, pp. 151-161, 196-202, etc.). Interrogatories as to matters of opinion should not be permitted, particularly when the identical matter has already been examined into by deposition.

Interrogatory 10. Interrogatory 10 is not relevant to the cause of action stated in defendant's counterclaim and is not calculated to lead to admissible evidence. Defendant has made no showing whatever of the pertinence of this interrogatory, and information sought herein is immaterial.

Wherefore, plaintiff moves this Court for an order striking said interrogatories and excusing plaintiff from answering them.

Louis A. Kohn,
Miles G. Seeley,
Newton N. Minow,
Attorneys for Plaintiff.

Dated: September 16, 1954.

38 And on the same day, to wit, on the 16th day of September, 1954, being one of the days of the regular September, 1954 term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William J. Campbell, District Judge, appears the following entry, to wit:

39 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—53-C-2482) * *

This day come the parties by their counsel and the plaintiff by its counsel presents its objections to interrogatories and said objections hereby are taken under advisement on briefs and written arguments pursuant to Rule 7 of the Rules of this Court and it is

Ordered that the plaintiff's brief shall be filed within five days from this date, that the defendant's brief shall be filed ten days thereafter and that the reply brief shall be filed five days thereafter and by agreement of the parties by their counsel it is

Further Ordered that the trial of this cause be and the same hereby is reset from October 4, 1954 to November 15, 1954.

40 And afterwards, to wit, on the 8th day of October, 1954, being one of the days of the regular October term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William J. Campbell, District Judge, appears the following entry, to wit:

41 IN THE UNITED STATES DISTRICT COURT.

• • (Caption—53-C-2482) • •

This day again come the parties by their counsel and a further pre-trial conference is held, the objections of the plaintiff to certain interrogatories are discussed and counsel for the parties indicate that they may work out their differences thereon and on motion of the defendant by counsel it is

Ordered that leave be and hereby is granted to the defendant to file an amended answer to the complaint within thirty days and that the reply thereto shall be filed within thirty days thereafter and it is

Further Ordered that each side be and they hereby are directed to exhibit to the other, thirty days in advance of trial, all documents to be presented in evidence and to be prepared at the trial to stipulate as to their authenticity and it is

Further Ordered that the trial of this cause be and the same hereby is reset from November 15, 1954 to December 15, 1954.

42 And afterwards on, to wit, the 10th day of November, 1954 came the Defendant by his attorneys and filed in the Clerk's office of said Court his certain Amended Answer And Counterclaim in words and figures following, to wit:

43 IN THE UNITED STATES DISTRICT COURT.

• • (Caption—53-C-2482) • •

AMENDED ANSWER AND COUNTERCLAIM.

Answer.

Henry Appelbaum, doing business as Penguin Frozen Foods, defendant, by his attorneys, answers the complaint of Refrigeradora del Noroeste, S. A., plaintiff, as follows:

1. Defendant admits the allegations of paragraph 1 of the complaint.

2. Defendant admits the allegations of paragraph 2 of the complaint.

3. Defendant admits the allegations of paragraph 3 of the complaint.

4. Defendant admits the allegations of paragraph 4 of the complaint.

5. Defendant denies that plaintiff delivered to defendant the shrimp required to be delivered by plaintiff prior to October 20, 1953, and denies that the plaintiff has performed all other conditions precedent required to be performed by the plaintiff. Defendant admits that plaintiff delivered eight carloads of shrimp during June, July and August, 1953, but defendant avers that said shrimp were defective in quality and quantity in violation and breach of the agreements between the plaintiff and defendant.

6. Answering paragraphs 6, 7 and 8, and further answering the entire complaint, defendant avers that despite the agreements between the plaintiff and defendant
44 dated October 19, 1950, and July 22, 1952, whereby plaintiff agreed to sell and deliver all shrimp caught or purchased and packed and frozen by plaintiff during the period from August 16, 1952, to August 15, 1954, plaintiff without justification repudiated and breached said agreements by written statements to the defendant dated February 25, 1953, March 5, 1953, July 17, 1953, August 13, 1953, August 19, 1953, August 20, 1953, August 24, 1953, August 27, 1953, September 7, 1953, and other written and oral statements and by plaintiff's actions, and plaintiff rendered performance of its agreements with defendant impossible by plaintiff's voluntary affirmative acts in agreeing with others to sell its shrimp in the United States in violation and breach of its agreements with defendant. Defendant denies all of the other allegations of paragraphs 6, 7 and 8 of the complaint.

7. The violations, breaches and repudiations of its agreements with the defendant by the plaintiff, as described in paragraphs 5 and 6 hereof, damaged and injured the defendant in excess of the sum of $250,000 in loss of profits under said agreements, in loss of customers and consumer good will and in expenses incurred in reliance upon said agreements.

Wherefore, defendant prays that the complaint herein be dismissed at the cost of the plaintiff.

Counterclaim.

1. Defendant realleges his admissions and averments contained in paragraphs 1 through 6 of his answer herein.

2. Defendant further alleges that the violations, breaches and repudiations by the plaintiff of its agreements with the defendant injured and damaged the defendant in the amount of $250,000, in loss of profits under said agreements, in loss of customer and consumer good will and in expenses incurred in reliance upon said agreements.

45 3. On or about July 22, 1952, an oral agreement was entered into between the plaintiff and the defendant whereby the plaintiff agreed to perform the service of breading approximately one million pounds per year of small shrimp to be caught by plaintiff during plaintiff's off-season or procured elsewhere by plaintiff and for which breading plaintiff was to be paid its costs plus four (4) cents per pound profit, the said oral agreement to exist during the duration of the written agreements dated October 19, 1950, and July 22, 1952, between plaintiff and defendant and which oral agreement was performed to the extent that defendant sent plaintiff a deveining machine, a carload of breading and breaded shrimp labels and cartons and plaintiff procured for defendant breaded shrimp cartons at a cost of $9,000 and plaintiff sent samples of breaded shrimp to defendant. The plaintiff breached said oral agreement by failing to bread any shrimp in accordance with its terms. The profit which defendant would have realized upon the sale of at least one million pounds of breaded shrimp during the period ending August 15, 1954, but for plaintiff's breach, was ten (10) cents per pound or One Hundred Thousand Dollars ($100,000). The defendant also suffered damages due to plaintiff's breach of said oral agreement in the amount of expenses which defendant incurred in reliance upon said oral agreement, consisting of $3,205.62 for breading, $9,000.00 for cartons, $149.00 for deveining machine, $794.03 for cellophane, labels, inserts, cartons and cases, and $692.00 for customs duties, totaling $13,840.65.

Wherefore, defendant demands judgment in his favor upon his counterclaim for Three Hundred Sixty-Three Thousand Eight Hundred Forty and 65/100ths Dollars

($363,840.65), together with interest as provided by law and the costs herein.

Henry Appelbaum, doing business as
Penguin Frozen Foods,
By Stanford Clinton,
134 N. La Salle St.,
DE 2-0525,
Robert A. Sprecher,
100 W. Monroe St.,
RA 6-2632.

Of Counsel:
Pritzker, Pritzker & Clinton,
Crowley, Sprecher & Weeks.

46 And afterwards on, to wit, the 23rd day of November, 1954, came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Notice and Motion to Strike in words and figures following, to wit:

47 IN THE UNITED STATES DISTRICT COURT.
• • (Caption—53-C-2482) • •

NOTICE.

To: Stanford Clinton, Esq.,
134 N. La Salle St.,
Chicago, Illinois,
Robert A. Sprecher, Esq.,
100 W. Monroe St.,
Chicago, Illinois,
Attorneys for Defendant.

You are hereby notified that on the 23rd day of November, 1954, at the opening of court in the forenoon, or as soon thereafter as counsel can be heard, we shall appear before his Honor William J. Campbell, Judge of the said United States District Court, in the courtroom usually occupied by him in the United States Court House, Chicago, Illinois, or before such other Judge as may be sitting in his place and stead, and shall then and there present the Motion to Strike, copy of which is herewith

served upon you and shall ask that the Court reset the date for the trial of this cause.

Louis A. Kohn,
Miles G. Seeley,
Patrick W. O'Brien,
Attorneys for Plaintiff,
231 S. La Salle St.,
Chicago, Illinois,
Telephone: STate 2-0600.

Mayer, Meyer, Austrian & Platt,
Of Counsel.

48 Received copy of the Motion to Strike hereinabove referred to this 19th day of November, 1954.

Stanford Clinton,
Robert A. Sprecher,
Attorneys for Defendant.

49 IN THE UNITED STATES DISTRICT COURT.

• • (Caption—53-C-2482) • •

MOTION TO STRIKE.

Plaintiff moves the court to strike paragraph 3 of defendant's counterclaim as amended on the ground that the allegations therein contained fail to state a cause of action against plaintiff upon which any relief can be granted, it appearing that the alleged oral agreement upon which the claim there asserted is based was never reduced to writing and signed by the plaintiff, and is in violation of the Statute of Frauds of Illinois (Ill. Rev. Stat. 1953, Ch. 59, Sec. 1).

Louis A. Kohn,
Miles G. Seeley,
Patrick W. O'Brien,
Attorneys for Plaintiff,
231 S. La Salle St.,
Chicago, Illinois,
Telephone: STate 2-0600.

Mayer, Meyer, Austrian & Platt,
Of Counsel.

50 And on the same day, to wit, on the 23rd day of November, 1954, being one of the days of the regular November, 1954, term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William J. Campbell, District Judge, appears the following entry, to wit:

51 IN THE UNITED STATES DISTRICT COURT.

• • (Caption—53-C-2482) • •

On motion of the plaintiff by its counsel it is

Ordered that the trial of this cause be and the same hereby is reset from December 15, 1954 to January 17, 1955 and the plaintiff's motion to strike a portion of the counterclaim hereby is taken under advisement by the Court on briefs and written arguments pursuant to Rule 7 of the Rules of this Court and it is

Further Ordered that leave be and hereby is granted to the plaintiff to file its supporting brief instanter, that opposing brief shall be filed ten days from this date and that reply brief shall be filed five days thereafter, and that the time for the plaintiff to answer or otherwise plead to the remainder of the defendant's answer and counterclaim be and the same hereby is extended until five days after the Court rules on the plaintiff's motion to strike.

• • • • •

54 And afterwards, to wit, on the 18th day of January, 1955, being one of the days of regular January, 1955, term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William J. Campbell, District Judge, appears the following entry, to wit:

55 IN THE UNITED STATES DISTRICT COURT.
• • (Caption—53-C-2482) • •

Upon due consideration the Court being fully advised it is

Ordered that the plaintiff's motion to strike paragraph 3 of the defendant's amended counterclaim be and the same hereby is denied and that the plaintiff shall file his answer to said amended counterclaim within twenty days from this date and it is

Further Ordered that this cause be and the same hereby is set for trial on February 10, 1955.

56 And afterwards on, to wit, the 28th day of January, 1955, came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Reply to Defendant's Amended Counterclaim in words and figures following, to wit:

57 IN THE UNITED STATES DISTRICT COURT.
• • (Caption—53-C-2482) • •

REPLY OF PLAINTIFF TO DEFENDANT'S AMENDED COUNTERCLAIM.

Now Comes plaintiff, by its attorneys, pursuant to order of Court entered herein on January 18, 1955, and for its reply to the amended counterclaim says:

1. Answering the allegations in Paragraphs 1 and 2 of the amended counterclaim, it avers that plaintiff has in all respects performed its obligations and undertakings under its agreement with defendant entered into on or about July 22, 1952 and denies that defendant has in any way been injured and damaged or has incurred any loss as result of any breach of said agreement by plaintiff.

2. It denies the allegations in Paragraph 3 of said amended counterclaim.

3. As a further and separate defense to Paragraph 3 of said amended counterclaim, it avers that the oral agreement therein alleged as having been entered into
58 on or about July 22, 1952, could not have been fully performed within a year or prior to August 15, 1954, and the claim asserted in said Paragraph is therefore un-

enforceable under the applicable provisions of the Statute of Frauds of the State of Illinois.

Wherefore, plaintiff prays that the amended counterclaim herein be dismissed at defendant's costs.

Louis A. Kohn,
Miles G. Seeley,
Patrick W. O'Brien,
Attorneys for Plaintiff,
231 South La Salle Street,
Chicago 4, Illinois,
Telephone: STate 2-0600.

Mayer, Friedlich, Spiess, Tierney,
Brown & Platt,
(Formerly Mayer, Meyer, Austrian
& Platt),
Of Counsel.

• • • • •

70 And afterwards on, to wit, the 15th day of April, 1955, came the Defendant by his attorneys and filed in the Clerk's office of said Court his certain Notice, Motion to Compel John W. Willis, to Answer Oral Interrogatories on Deposition and Affidavit of Robert A. Sprecher, in words and figures following, to wit:

• • • • •

73 IN THE UNITED STATES DISTRICT COURT.
Southern District of California,
Southern Division.

IN THE UNITED STATES DISTRICT COURT.
• • (Caption—53-C-2482) • •

MOTION TO COMPEL JOHN W. WILLIS, A RESIDENT OF THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION, TO ANSWER ORAL INTERROGATORIES ON DEPOSITION.

Defendant, Henry Appelbaum, by his attorneys, moves the United States District Court for the Southern District of California, Southern Division, for an order requiring and directing John W. Willis, a resident of said

district and said division, to answer the following oral interrogatories propounded to him during the course of his examination upon the taking of his deposition before Julian R. Schwab, a Notary Public, at Beverly Hills, California, on March 3, 1955, which interrogatories John W. Willis failed to answer:

1. What is the outstanding capital stock of Crest? (Dep. 5, 6, 7.)
2. What was said between you and Mr. Pinson about the formation of Crest at the first conference at the Del Prado Hotel in Mexico City in March, 1953? (Dep. 19.)
3. What connection, if any, did Senor Martinez Ostes have with Reno? (Dep. 20.)
4. What was said at the second conference in March, 1953? (Dep. 20.)

74 5. What took place at the May, 1953, meeting at Mexico City? (Dep. 25.)

6. You refused to produce a copy of the written agreement between Crest and E A? (Dep. 28, 29.)
7. Do you know who advanced the capital for E A? (Dep. 29, 30.)
8. Didn't you go into the Bank of America and unfold your program to them? (Dep. 38.)
9. What was the total production of Reno shrimp distributed by Crest in the year beginning September 30, 1953? (Dep. 42.)
10. You won't disclose the conversation which you had with Mr. Pinson in Chicago, will you? (Dep. 61.)

Defendant further moves the Court for an order requiring and directing John W. Willis to produce all correspondence and other documents leading to the formation of Crest Importing Company.

In support of this Motion, the Affidavit of Robert A. Sprecher is attached hereto.

Henry Appelbaum, doing business as
Penguin Frozen Foods,
By Stanford Clinton,
134 N. La Salle Street,
Chicago 2, Illinois,
DE 2-0525,
Robert A. Sprecher,
100 W. Monroe Street,
Chicago 3, Illinois,
RA 6-2632,
Attorneys for Defendant

75 IN THE UNITED STATES DISTRICT COURT,

Southern District of California,

Southern Division.

IN THE UNITED STATES DISTRICT COURT.

* * (Caption—53-C-2482) * *

AFFIDAVIT.

Robert A. Sprecher, being first duly sworn on oath, deposes and says that:

1. He is an attorney licensed to practice law in the State of Illinois and is one of the attorneys of record for the defendant in the above entitled cause in the Northern District of Illinois, Eastern Division.

2. The above captioned case is pending in the Northern District of Illinois, Eastern Division, and is presently on the trial call of the Honorable Judge William J. Campbell awaiting trial.

3. John W. Willis voluntarily appeared on March 3, 1955, before Julian R. Schwab, a Notary Public, in Room 521 of the Beverly Wilshire Hotel, Beverly Hills, California, for the purpose of the taking of his oral deposition.

4. John W. Willis refused to answer the questions set forth in the Motion to which this affidavit is attached and this affidavit is made in support of said Motion to compel John W. Willis to answer the questions set forth therein.

Robert A. Sprecher.

Subscribed and sworn to before me this 15th day of April, A. D. 1955.

L. R. Hanske,
Notary Public.

(Seal)

76 And afterwards on, to wit, the 21st day of April, 1955, came the Defendant by his attorneys and filed in the Clerk's office of said Court his certain Notice, Motion to Compel Answers to Interrogatories, in words and figures following, to wit:

• • • • •

79 IN THE UNITED STATES DISTRICT COURT.

• • (Caption—53-C-2482) • •

MOTION TO COMPEL ANSWERS TO INTERROGATORIES.

Now comes the defendant, Henry Appelbaum, by his attorneys, and moves the Court as follows:

1. On September 8, 1954, the defendant, after commencement of the above entitled action, served on the plaintiff in this cause ten interrogatories in writing pursuant to Rule 33 of the Federal Rules of Civil Procedure, which interrogatories are attached hereto.

2. Plaintiff answered interrogatories 1, 2, 3, 4, 5 and 10 but did not answer such interrogatories under oath as required by Rule 33 of the Federal Rules of Civil Procedure.

3. Plaintiff failed and refused to answer interrogatories Nos. 6, 7, 8 and 9.

Wherefore, defendant moves that this Court enter an order directing and requiring plaintiff to answer all of said interrogatories under oath.

Henry Appelbaum, doing business as
Penguin Frozen Foods,
By Stanford Clinton,
134 N. La Salle Street,
Chicago 3, Illinois,
DE 2-0525,
Robert A. Sprecher,
100 W. Monroe Street,
Chicago 3, Illinois,
RA 6-2632,
Attorneys for Defendant.

(Interrogatories and Exhibit A attached but not copied.)

80 And on the same day to wit, on the 21st day of April, 1955, being one of the days of the regular April 1955 term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William J. Campbell, District Judge, appears the following entry, to wit:

81 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—53-C-2482) * *

This cause coming on for hearing on the motion of the defendant to compel answers to interrogatories come the parties by their counsel and said motion hereby is taken under advisement on briefs and written arguments pursuant to Rule 13 of the Rules of this Court and it is

Ordered that supporting brief shall be filed within five days, that opposing brief shall be filed within five days thereafter and that reply brief shall be filed within five days thereafter.

82 And afterwards on, to wit, the 10th day of May, 1955 came the Defendant by his attorneys and filed in the Clerk's office of said Court his certain Notice Of Motion, Motion For Production Of Documents, Etc., Under Rule 34, And Affidavit Of Robert A. Sprecher in words and figures following, to wit:

* * * * *

85 IN THE UNITED STATES DISTRICT COURT.

* * (Caption 53-C-2482) * *

MOTION FOR PRODUCTION OF DOCUMENTS, ETC., UNDER RULE 34.

Defendant, Henry Appelbaum, doing business as Penguin Frozen Foods, moves the Court for an order requiring plaintiff, Refrigeradora del Noroeste, S.A., a Mexican corporation, to produce and to permit defendant to inspect and copy or photograph each of the following documents:

1. Corporate record books showing all corporate action taken by plaintiff corporation in relation to its contract with defendant.
2. All corporate minute books, journals and other books

of entry showing official corporate action during the years 1952, 1953 and 1954.

3. Books of account showing income and sales, by classes, of plaintiff for the years 1953 and 1954.

4. All records, accounts, account books, journals, ledgers, financial records, vouchers, statements, bank statements, deposit slips, cancelled checks, receipts, bills, correspondence, documents, letters, papers, tax returns, and writings of all kinds showing (a) all of the income of plaintiff from the sale of shrimp for the years 1953 and 1954, (b) the gross sales, by classes, of all shrimp produced, packed, shipped or otherwise handled by plaintiff in the years 1953 and 1954, and (c) the buyers and recipients of all shrimp produced, frozen, packed, shipped or otherwise handled by plaintiff during the years 1953 and 1954.

5. All of the originals or copies of all of the letters, correspondence, documents, papers and writings of all kinds relating to plaintiff's business transactions with defendant during the years 1952, 1953 and 1954.

6. Copy of contract or agreement existing between Crest Import Company and Exportadores Associados.

86 Plaintiff has possession, control and custody of each of the foregoing documents and objects. Each of them constitutes or contains evidence relevant and material to a matter involved in this action, as is more fully shown in Exhibit "A" hereto attached.

Henry Appelbaum, doing business as Penguin Frozen Foods,
By Stanford Clinton,
134 North LaSalle Street,
Chicago 2, Illinois,
Robert A. Sprecher,
100 West Monroe Street,
Chicago 3, Illinois,
Attorneys for Defendant.

87 **Exhibit "A".**

State of Illinois, } ss
County of Cook. }

Affidavit.

Robert A. Sprecher, being first duly sworn on oath, deposes and says:

1. That he is one of the attorneys for defendant in the above entitled action.
2. That upon information and belief, he is of the opinion that the documents and objects designated in the foregoing motion are in the possession, control and custody of the plaintiff corporation.
3. That each of the documents and objects described in the foregoing motion constitutes or contains evidence relevant and material to either or both of the following issues involved in this action:
   (a) Question of breach of contract.
   (b) Question of damages.
4. That good cause exists for the discovery and production of the documents and objects described in the foregoing motion.

Robert A. Sprecher.

Subscribed and sworn to before me this 5th day of May, A. D. 1955.

L. R. Hanske,
(Seal) *Notary Public.*

88 And on the same day to wit, on the 10th day of May, 1955, being one of the days of the regular May term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William J. Campbell, District Judge, appears the following entry, to wit:

89 In the United States District Court.
* * (Caption—53-C-2482) * *

This cause coming on for hearing on the defendant's motion to produce documents come the parties by their counsel and said motion hereby is taken under advisement

on briefs and written arguments pursuant to Rule 13 of the Rules of this Court and it is

Ordered that supporting brief shall be filed by May 12, 1955 and that opposing brief shall be filed by May 13, 1955.

90 And afterwards, to wit, on the 12th day of May, 1955, being one of the days of the regular May 1955 term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William J. Campbell, District Judge, appears the following entry, to wit:

91 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—53-C-2482) * *

Upon due consideration the Court being fully advised in the premises it is

Ordered that the plaintiff shall answer interrogatories numbers 1, 2, 3, 4, 5, 6, 8, 9 and 10 under oath and it is

Further Ordered that the plaintiff shall answer under oath interrogatory number 7, except insofar as this interrogatory asks the plaintiff to state the market price of the shrimp in question

92 And afterwards, to wit, on the 16th day of May, 1955, being one of the days of the regular May 1955 term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William J. Campbell, District Judge, appears the following entry, to wit:

93 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—53-C-2482) * *

Upon due consideration the Court being fully advised it is

Ordered that the plaintiff shall produce for the defendant's inspection, in accordance with the willingness expressed in its brief, all the documents referred to in paragraphs 1 and 5 of the defendant's motion for the production of documents and in regard to paragraphs 2, 3, 4 and 6 it is

Further Ordered that the defendant's motion for the production of documents be and the same hereby is denied.

* * * * *

96 And afterwards on, to wit, the 27th day of May, 1955 came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Request For Admission Of Genuineness of Documents, in words and figures following, to wit:

97 UNITED STATES DISTRICT COURT.

* * (Caption—53-C-2482) * *

REQUEST FOR ADMISSION OF GENUINENESS OF DOCUMENTS.

Plaintiff, Refrigeradora Del Noroeste, S.A., requests defendant Henry Appelbaum, doing business as Penguin Frozen Foods, within ten days after service of this request or within such shorter time as the Court may allow, to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That each of the following documents, exhibited with this request, is genuine.

A. Sales Contract dated October 19, 1950 by and between Refrigeradora Del Noroeste, S.A. and Penguin Frozen Foods, Inc. (Exhibit A)

98 B. Letter dated July 21, 1952 from plaintiff to Penguin, and translation thereof, extending Sales Contract for two years. (Exhibits B and B')

C. Telegram from plaintiff to Penguin Frozen Foods, Inc. dated September 7, 1953. (Exhibit C)

D. Letter from plaintiff to Penguin Frozen Foods dated October 3, 1953. (Exhibit D)

E. Telegram from defendant to plaintiff dated October 6, 1953. (Exhibit E)

F. Telegram from plaintiff to defendant dated October 7, 1953. (Exhibit F)

G. Telegram from defendant to plaintiff dated October 8, 1953. (Exhibit G)

H. Telegram from plaintiff to defendant dated October 20, 1953. (Exhibit H)

I. Telegram from defendant to plaintiff dated October 23, 1953. (Exhibit I)

J. Memo sent to L. A. Kohn by R. A. Sprecher on 12/22/54. (Ex. J)

2. That each of the following statements is true:

A. The contract attached hereto as Exhibit A was duly executed by the parties thereto and is the agreement of October 19, 1950 referred to in paragraph 4 of the complaint.

99 B. The letter attached hereto as Exhibit B and B' was duly executed by plaintiff and defendant and is the written agreement entered into on or about July 22, 1952 referred to in paragraph 4 of the complaint.

C. That the communications attached hereto as Exhibits C through I both inclusive were sent and received in the ordinary course of business by the plaintiff and defendant.

Louis A. Kohn,
Patrick W. O'Brien,
Attorneys for Plaintiff,
231 South La Salle Street,
Chicago 4, Illinois.

Mayer, Friedlich, Spiess,
Tierney, Brown & Platt,
Of Counsel.

Received a copy of the foregoing Request for Admissions, and Exhibits A through I, both inclusive, attached thereto this 27 day of May, 1955.

Robert A. Sprecher,
One of the Attorneys for Defendant.

(Exhibits "A" thru & including "J" Attached but not copied.)

• • • • •

101 And on the same day to wit, the 27th day of May, 1955 came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Notice in words and figures following, to wit:

102 UNITED STATES DISTRICT COURT.
* * (Caption---53-C-2482) * *

NOTICE.

To: Stanford Clinton, Esq.
134 North La Sallet Street
Chicago 2, Illinois

Robert A. Sprecher
100 West Monroe
Chicago 3, Illinois

Please take notice that on the 31st day of May 1955 at 10:00 in the morning or as soon thereafter as counsel can be heard we shall appear before His Honor, William J. Campbell, Judge of the United States District Court, in the courtroom usually occupied by him in the United States Court House, Chicago, Illinois, or before such other judge as may be sitting in his place and stead, and shall then
103 and there move the Court to fix a time less than ten days, depending on the position of this cause on the trial list, for the defendant to answer plaintiff's request for admissions served on you this date.

Louis A. Kohn,
Patrick W. O'Brien,
Attorneys for Plaintiff.
231 South La Salle Street,
Chicago 4, Illinois.

Mayer, Friedlich, Spiess,
Tierney, Brown & Platt,
Of Counsel.

Proof of Service.

Received a copy of the above and foregoing notice this 27th day of May 1955.

Robert A. Sprecher,
One of the Attorneys for Defendant.

104 And afterwards, to wit, on the 31st day of May, 1955, being one of the days of the regular May, 1955, term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William J. Campbell, District Judge, appears the following entry, to wit:

105 IN THE UNITED STATES DISTRICT COURT.
• • (Caption—53-C-2482) • •

This cause coming on for hearing on the motion of the defendant to remove the case from the trial call come the parties by their counsel and the Court now having heard the arguments of counsel it is

Ordered that witness John W. Willis shall appear with his records to testify at the trial of this cause and that his deposition shall be taken prior to trial, in Chicago, on behalf of the defendant.

106 And on the same day, to wit, on the 31st day of May, 1955, being one of the days of the regular May, 1955 term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William J. Campbell, District Judge, appears the following entry, to wit:

107 IN THE UNITED STATES DISTRICT COURT.
• • (Caption—53-C-2482) • •

On motion of the plaintiff by its counsel it is

Ordered that the defendant shall answer plaintiff's request for admissions by June 3, 1955.

108 And afterwards on, to wit, the 3rd day of June, 1955 came the Defendant by his attorneys and filed in the Clerk's office of said Court certain Notice, Motion and Affidavit, and Attached Thereto the Amendment to Answer and Counterclaim, in words and figures following, to wit:

109 IN THE UNITED STATES DISTRICT COURT.
• • (Caption—53-C-2482) • •

NOTICE.

To: Mr. Louis A. Kohn,
Mayer, Friedlich, Spiess, Tierney, Brown & Platt,
Attorneys for Plaintiff,
231 South La Salle Street,
Chicago 4, Illinois.

Please Take Notice That on Friday, June 3, 1955, at the hour of 10:00 o'clock A. M., or as soon thereafter as

counsel can be heard, we shall appear before His Honor William J. Campbell, Judge of the said United States District Court, in the courtroom usually occupied by him in the United States Court House, Chicago, Illinois, or before such other Judge as may be sitting in his place and stead, and shall then and there present the attached Motion, a copy of which is herewith served upon you.

Stanford Clinton,
134 N. La Salle Street,
Chicago 2, Illinois—DE 2-0525,
Robert A. Sprecher,
100 W. Monroe Street,
Chicago 3, Illinois—RA 6-2632,
Attorneys for Defendant.

Received a copy of the above and foregoing Notice, together with attached Motion, affidavit, and Amendment to Amended Answer and Counterclaim, this 2nd day of June, 1955.

Patrick W. O'Brien,
One of the Attorneys for Plaintiff.

110 IN THE UNITED STATES DISTRICT COURT.
• • (Caption—53-C-2482) • •

MOTION.

The defendant, Henry Appelbaum, doing business as Penguin Frozen Foods, by his attorneys, Stanford Clinton and Robert A. Sprecher, hereby moves the Court for leave to file instanter the attached Amendment to his Amended Answer and Counterclaim, the affidavit of Robert A. Sprecher in support of which is hereto attached.

Henry Appelbaum, doing business as
Penguin Frozen Foods,
By Stanford Clinton,
134 N. La Salle Street,
Chicago 2, Illinois,
By Robert A. Sprecher,
100 W. Monroe Street,
Chicago 3, Illinois,
Attorneys for Defendant.

111 IN THE UNITED STATES DISTRICT COURT.
• • (Caption—53-C-2482) • •

AFFIDAVIT.

Robert A. Sprecher, being first duly sworn on oath, deposes and says:

1. That he is an attorney licensed to practice law in the State of Illinois and is attorney of record for the defendant in the above entitled cause.

2. In preparing the above entitled case for trial and particularly after Stanford Clinton, one of the attorneys for the defendant, traveled to California and to Mexico within the past few weeks, counsel for defendant learned additional facts which they believe constitute a further cause of action by the defendant against plaintiff corporation.

3. Inasmuch as the plaintiff corporation is a Mexican corporation and is not available for suit anywhere in the United States, it is imperative that the additional remedy available to the defendant be added as an additional count to the Counterclaim in the above entitled cause of action.

4. This Amendment is not filed for the purpose of delay and as a matter of fact in filing it the defendant makes no request that the trial date be delayed because of such filing but is ready, willing and able to proceed with the trial whenever the above entitled case is called for trial by this court.

Robert A. Sprecher.

Subscribed and sworn to before me this 1st day of June, 1955.

L. R. Hanske,
(Seal) *Notary Public.*

112 IN THE UNITED STATES DISTRICT COURT.
• • (Caption—53-C-2482) • •

AMENDMENT TO AMENDED ANSWER AND COUNTERCLAIM.

The Amended Answer and Counterclaim of defendant is amended by denominating the existing counterclaim as "Count I" and adding the following:

Count II.

1. Defendant realleges his admissions and averments contained in paragraphs 1 through 6 of his answer herein.

2. Each and every one of the acts herein alleged to have been committed by the plaintiff corporation has resulted in the restraining of interstate commerce in the City of Chicago, County of Cook and State of Illinois, and in the Northern District of Illinois, Eastern Division, and elsewhere, and has tended to and actually has created a monopoly in interstate commerce within the said district, and defendant herein has been injured in its business and property by reason of the doing of said acts in violation of the anti-trust laws of the United States.

3. Defendant in reliance upon its contracts with the plaintiff corporation dated October 19, 1950, and July 22, 1952, developed a large and profitable market in the United States for the distribution and sale of high quality Mexican shrimp through investment in advertising, in public relations work with consumers of shrimp and in a marketing and distribution system based upon high quality product, service and good will.

113 4. The plaintiff corporation well knowing each and all of the above facts thereby entered into a conspiracy with Pedro Pinson, John W. Willis, Isaac Coppel, Foresto Horedo, Hernando DeCima, Ernesto DeCima, Hector Ferrera, and Congeladora del Pacifico, a Mexican corporation, to destroy the entire value of defendant's investment by depriving the defendant of access to high quality Mexican shrimp so that for want or lack of a sufficient supply of such shrimp the defendant would be compelled to cease selling such shrimp, would lose its investment, its customers and its good will.

5. To that end and for that purpose the plaintiff corporation and the other conspirators named in the preceding paragraph which had theretofore been competitors connived and conspired with each other to combine with each for the purpose of suppressing and destroying competition, fixing prices and monopolizing distribution, and pursuant to said conspiracy did and made, the following acts and contracts, all of which were done and made for the purpose of preventing the defendant from continuing in the business of distributing and selling high quality Mexican shrimp and thereby destroying the business,

credit, standing and good will of the defendant and to that end the plaintiff corporation and the other conspirators did the following things:

(a) The plaintiff corporation and the other conspirators caused a Mexican corporation to be formed known as "Exportadores Associados", which corporation is owned by and represents the producers of more than sixty percent of the total production of high quality shrimp on the West Coast of Mexico and to which corporation all of the conspirators deliver their shrimp.

(b) The plaintiff corporation and the other conspirators caused an American corporation to be formed known as "Crest Importing Company, Inc.", which corporation is owned by Exportadores Associados and is the exclusive distributor in the United States of all shrimp owned by Exportadores Associados.

114 (c) Exportadores Associados has contracts with the producers of more than sixty percent of the production of high quality shrimp produced on the West Coast of Mexico and Crest Importing Company, Inc., in turn, has an agreement with Exportadores Associados to act as the exclusive distributor in the United States of all shrimp owned by Exportadores Associados, the effect of such contracts being to guarantee that Crest Importing Company, Inc., distributes exclusively in the United States more than sixty percent of the high quality shrimp produced on the West Coast of Mexico.

6. Each and all of said acts was conceived and carried out with the purpose of preventing the defendant or any other person or corporation from obtaining any supply or source of high quality West Coast Mexican shrimp by (1) channeling the distribution of all high quality West Coast Mexican shrimp through Exportadores Associados and Crest Importing Company, Inc., so that no supply would be available for anyone else and (2) by destroying the business, credit, good will and reputation of defendant so that there could be no competition to the distribution operation of Exportadores Associados and Crest Importing Company, Inc.

7. Said acts, contracts and conspiracy on the part of the plaintiff corporation and the other conspirators were successful and as a result thereof defendant was not able to obtain a sufficient supply or source of high quality West Coast Mexican shrimp to operate its business successfully, the defendant was not able to supply its customers with

said shrimp and consequently the defendant suffered a loss of customers and goodwill in excess of $100,000.

8. Each and every one of the acts of the plaintiff corporation and the other conspirators hereinbefore alleged, were each and all intended to be by the plaintiff corporation and the other conspirators, and were conceived and
115 carried out for that purpose, and were in restraint of trade and commerce in the states of the United States; and constituted and were intended by them, and were in effect, a combination and conspiracy in restraint of trade and commerce among the several states, in that they were intended to and did prevent the defendant and any other person from entering into contracts for the selling and distribution of high quality West Coast Mexican shrimp; and each and every one of said acts were in violation of the Sherman Anti-trust Act and the Clayton Anti-trust Act, and do and did create and produce and constituted a monopoly, and were intended to, and had the effect of an attempt to, monopolize the distribution and sale of high quality West Coast Mexican shrimp in the United States, all of which was and is injurious to defendant, and prevented defendant from realizing its investment as defendant would and could have done except because of said conspiracy; and because of the inability to compete in the market because of the foregoing, the said acts and each of them did prevent the free flow of high quality West Coast Mexican shrimp in commerce among the several states.

8. As a result of said combination, conspiracy and various acts done in pursuance thereof as hereinbefore alleged by the plaintiff corporation and the other conspirators therein, it did become impossible for defendant to continue to operate his business of selling and distributing high quality West Coast Mexican shrimp and the value of defendant's said investment was wholly destroyed to defendant's damage in the sum of in excess of $100,000.

9. That neither the plaintiff corporation, which is a Mexican corporation, nor any of the other conspirators can be found nor do they reside or have agents within the Northern District of Illinois, Eastern Division, and the only remedy which the defendant has against the plaintiff corporation is by means of a counterclaim in the above entitled cause of action.

Wherefore, defendant prays judgment against the
116 plaintiff corporation for the sum of Three Hundred Thousand Dollars ($300,000.00), treble damages, as

provided by the Clayton Amendment to the Sherman Anti-trust Act, together with a reasonable counsel feee and th costs and disbursements of this action.

Henry Appelbaum,
doing business as Penguin Frozen Foods,
By Stanford Clinton,
134 N. LaSalle Street,
Chicago 2, Illinois,
DE 2-0525,
By Robert A. Sprecher,
100 W. Monroe Street,
Chicago 3, Illinois,
RA 6-2632,
Attorneys for Defendant.

Of Counsel:
Pritzker, Pritzker & Clinton,
Crowley, Sprecher and Weeks,

117 Endorsed: In the U. S. District Court. * * (Caption—53-C-2482) * * Amendment to Amended Answer and Counterclaim.

118 And on the same day, to wit, on the 3rd day of June, 1955, being one of the days of the regular May 1955 term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William J. Campbell, District Judge, appears the following entry, to wit:

119 In the United States District Court.
* * (Caption—53-C-2482) * *

This day come the parties by their counsel and the defendant by his counsel presents his motion for leave to file instanter amendment to his amended answer and counterclaim and said motion is taken under advisement and it is

Ordered that memoranda in support and in opposition to said motion shall be filed simultaneously this afternoon.

120 And afterwards on, to wit, the 6th day of June, 1955 came the Defendant by his attorneys and filed in the Clerk's office of said Court his certain Notice and Request for Admission of Genuineness of Documents, in words and figures following, to wit:

* * * * *

123 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—53-C-2482) * *

REQUEST FOR ADMISSION OF GENUINENESS OF DOCUMENTS.

Defendant, Henry Appelbaum, doing business as Penguin Frozen Foods, requests plaintiff, Refrigeradora del Noroeste, S.A., within ten days after service of this request or within such shorter time as the Court may allow, to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That each of the following documents, exhibited with this request, is genuine:

A. Telegram from plaintiff to defendant, dated February 4, 1953 (Exhibit A).

B. Telegram from plaintiff to defendant, dated February 25, 1953 (Exhibit B).

C. Telegram from defendant to plaintiff, dated February 26, 1953 (Exhibit C).

D. Letter from plaintiff to defendant, dated May 20, 1953 (Exhibit D).

E. Letter from plaintiff to defendant, dated July 17, 1953 (Exhibit E).

F. Telegram from plaintiff to defendant, dated August 13, 1953 (Exhibit F).

G. Telegram from plaintiff to defendant, dated August 20, 1953 (Exhibit G).

H. Telegram from plaintiff to defendant, dated August 20, 1953 (Exhibit H).

I. Telegram from defendant to plaintiff, dated August 20, 1953 (Exhibit I).

124 J. Telegram from plaintiff to defendant, dated August 24, 1953 (Exhibit J).

K. Telegram from defendant to plaintiff, dated August 25, 1953 (Exhibit K).

L. Telegram from plaintiff to defendant, dated August 27, 1953 (Exhibit L).

M. Telegram from defendant to plaintiff, dated August 28, 1953 (Exhibit M).

2. That each of the communications attached hereto as Exhibits A through M, both inclusive, were sent and received in the ordinary course of business by the plaintiff and defendant.

Stanford Clinton,
134 N. LaSalle Street,
Chicago 2, Illinois,
Robert A. Sprecher,
100 W. Monroe Street,
Chicago 3, Illinois,
Attorneys for Defendant.

Of Counsel:
Pritzker, Pritzker & Clinton,
Crowley, Sprecher and Weeks.

(Exhibits "A" thru "M" Attached But Not Copied.)

125 And on the same day, to wit, on the 6th day of June, 1955, being one of the days of the regular June term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William J. Campbell, District Judge, appears the following entry, to wit:

126 UNITED STATES DISTRICT COURT.

• • (Caption—53-C-2482) • •

ORDER.

It appearing to the court that there has been no response by defendant within the time fixed by the Order entered herein on May 31, 1955 to the request of plaintiff for admission of genuineness of documents served by plaintiff on May 27, 1955, and truth of statements contained in said request, It Is Ordered that each such requested admission be deemed made by defendant for the purpose of this action only and subject to all pertinent objections as to admissibility which may be interposed at the trial.

Dated: June 6, 1955.

Campbell,
Judge.

127 And on the same day, to wit, on the 6th day of June, 1955, being one of the days of the regular June 1955 term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William J. Campbell, District Judge, appears the following entry, to wit:

128 IN THE UNITED STATES DISTRICT COURT.
• • (Caption—53-C-2482) • •

This day come the parties by their counsel and on the defendant's request for admissions filed this day the plaintiff admits the genuineness of all documents from A through M attached to said request.

129 And on the same day, to wit, on the 6th day of June, 1955, being one of the days of the regular June 1955 term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William J. Campbell, District Judge, appears the following entry, to wit:

130 IN THE UNITED STATES DISTRICT COURT.
• • (Caption—53-C-2482) • •

Upon due consideration the Court being fully advised in the premises it is

Ordered that the defendant's motion for leave to file instanter an amendment to his Amended Answer and Counterclaim be and the same hereby is denied for the following reasons:

(1) The defendant has not exercised the proper diligence in asserting the claim contained in the proposed amendment. It affirmatively appears that the defendant was put on notice of the facts asserted in the proposed amendment as early as May 1954.

(2) The proposed amended counterclaim fails to state a claim upon which relief may be granted since there is nothing in the proposed amendment to indicate that the inception, purpose, intent or intended consequence of plaintiff's conduct was to affect the market prices of shrimp, or otherwise to interfere with the free operation of economic

forces of the total amount of shrimp sold in the United States.

131 (3) The alleged contracts and conspiracy were entered into in Mexico between Mexican nationals and were to govern the sale and distribution of shrimp produced in Mexico.

(4) This case was called for trial on April 14, 1955 at which time counsel announced that they were ready for trial, whereupon, the cause was placed on the list of cases ready and awaiting trial. On May 31, 1955 the parties were advised that the case would proceed to trial on June 7, 1955. On June 3, 1955 the defendant sought to file this proposed amendment to his amended answer and counterclaim. It would impede the orderly administration of justice to permit the proposed amendment to be filed on the eve of the trial date.

• • • • •

140 And afterwards on, to wit, the 11th day of July, 1955 there was filed in the Clerk's office of said Court a certain Transcript of Proceedings Had Upon the Hearing Before the Honorable William J. Campbell, District Judge, in words and figures following, to wit:

• • • • •

1 IN THE UNITED STATES DISTRICT COURT.

• • (Caption—53-C-2482) • •

TRANSCRIPT OF PROCEEDINGS

had at the hearing before the Honorable William J. Campbell, one of the Judges of said Court, in his courtroom, United States Court House, Chicago, Illinois, on Tuesday, June 7, 1955, at 2:00 o'clock p. m.

Present:

Mr. Louis A. Kohn, Mr. Cornelius B. Kennedy, and Mr. Patrick O'Brien, appeared on behalf of the plaintiff.

Mr. Stanford Clinton, Mr. Robert A. Sprecher, and Mr. Joseph Clayton, appeared on behalf of the defendant.

2 Mr. Kohn: You have some motions, Mr. Clinton?

The Court: Have you prepared your subpoena duces tecum?

Mr. Clinton: Yes.
The Court: Have you given a copy to counsel?
Mr. Kohn: I have not seen it.
The Court: Will you look at it at the same time I do?
Mr. Clinton: Excuse me, Judge.
The Court: All right, Item No. 1. Let us go over every item by item. Where is Mr.—
Mr. Kohn: Mr. Willis, will you step up to the bar?
The Court: Item No. 1. Do you have these documents with you? I think they are material. At least they may become material.
Mr. Willis: Yes, sir, I have all of those with me.
The Court: All right.
Mr. Willis: Some of them include my employment contract which I would like to turn over to the Court and have him judge whether it is vital to the case.
Mr. Clinton: Judge, with respect to that—
The Court: Your employment contract?.
Mr. Willis: Yes.
The Court: What is your position with the Crest Company?
Mr. Willis: I am president.
The Court: President of it?
3 Mr. Willis: Yes.
The Court: What is the materiality of the employment contract?
Mr. Clinton: You are asking me?
The Court: Yes.
Mr. Clinton: Well, part of the—
The Court: Let me see it.
Mr. Clinton: Has your Honor passed Item No. 1?
The Court: No. That is what I am talking about. What is the materiality of the employment contract. I am not sure that Item No. 1 calls for it.
Mr. Clinton: This is 6.
The Court: All right. You might as well hand it up now.
Mr. Willis: Those are some of the letters to and from these people.
The Court: Your employment contract?
Mr. Willis: Yes. They are relating to that.
The Court: Other than this employment contract that I will pass on when we get to that item on No. 6, and the correspondence with reference thereto, these other documents you are prepared to deliver?

Mr. Willis: Yes, sir.

The Court: Very well. You may do so.

Mr. Clinton: May I make a statement?

4 The Court: Yes.

Mr. Clinton: My recollection of the witness' testimony was that with respect to the correspondence dealing with the sale of the shrimp during the year '53 and '54, and when I refer to that year that would be from August 15, 1953 to August 15, 1954. My recollection of his testimony was that he did not bring that correspondence.

The Court: You have that, you say?

Mr. Willis: I thought we were still talking about Item 1.

The Court: Yes, we are.

Mr. Willis: Mr. Clinton is talking about something else.

The Court: Oh, the originals or copies of letters, correspondence of all kinds relating to the formation of the Crest Importing Company.

Mr. Willis: Yes, sir, I have that.

The Court: That would not take from August 15, '54.

Mr. Willis: Yes.

The Court: Those you have and you have delivered or you have them here now?

Mr. Willis: I have them here, and I believe Mr. Clinton has a photostat of all copies.

The Court: Well, see that they are delivered to Mr. Clinton today and you give them a receipt for them.

5 Mr. Clinton: Yes, sir.

The Court: No. 2. Corporate record books, including all minutes and journals and other books of entry showing corporate action of Crest Importing Company during the years '53 and '54.

Do you have the corporate record books with you?

Mr. Willis: No, sir. I was not requested to bring them.

The Court: Now, what is it you want from the corporate record books?

Mr. Clinton: I would like the minutes and the records there to show the arrangements which were made between Crest and E. A.

The Court: At the time of the formation?

Mr. Clinton: The inception, the participation of Reno in the enterprise.

The Court: Well, suppose you telephone or wire your office in California to send by air mail either photostatic copies or the originals of the first three months' minutes, that would cover that, I should say?

Mr. Willis: Yes, sir, but may I say something there?

The Court: Surely.

Mr. Willis: I know that these minutes have nothing to do with the case.

6 The Court: Maybe you are right. At the time they are offered I will pass on them. You may file them with me. Bring them here and file them with me. If I find they have nothing to do with the case, I will not give them to counsel for defense, but, on the other hand, if I decide they do, I will.

Mr. Willis: Yes, sir.

The Court: So get the minutes for the first three months of the corporate existence of Crest and have them here.

Suppose you phone your office this afternoon. You won't need to be in Court while they are picking the jury.

Mr. Kohn: I just wanted to say this, that I did not ask Mr. Willis to bring them. I did not think they were wanted.

The Court: I thought I told you to ask him to bring everything.

Mr. Kohn: Well, I did not understand that that included them.

The Court: It will be easy to eliminate it if it is here. I can look at it and hand it right back to you. Now I can't. I don't know whether it is material or not.

Mr. Kohn: If it is anybody's fault, it is mine or

7 possibly Mr. Clinton's. It is not Mr. Willis'.

The Court: Well, you get those here then. Tell him to have them here, let us see, you better send on the originals. If we need them you can have them photostated here. It will be quicker.

Mr. Willis: All right, sir.

The Court: Have them air mailed to you here and suppose you produce them Thursday.

Now, Item 3, that is the first three months, you understand?

Mr. Willis: Well—

The Court: That could cover the initial period, the minutes. Then I will rule on whether or not he should have them when you get them here.

Mr. Willis: Well, your Honor, he also asked for journals and other books.

The Court: I have not gotten down to that yet.

Mr. Willis: Excuse me.

The Court: Oh, wait a minute. Yes, including all minutes, journals and other books of entry. I am including

only the corporate minutes, the minutes of the meetings of Board of Directors or the stockholders for the first three months. You understand?

Mr. Willis: Yes, sir.

8 The Court: Now, Item 3.

Mr. Clinton: What about the journals?

The Court: The journals I think are purely bookkeeping entries. I don't see the materiality of those. The day book?

Mr. Clinton: To show the financial transactions.

The Court: I think you are getting into that in one of the lower numbers, aren't you. You are getting into that in No. 3.

Under No. 2 you were to furnish only the corporate minute books of the first three months.

Board of Directors and stockholders, No. 3. All financial records and books of entry showing the receipt of shipments of shrimp originating from Refrigeradora del Noroeste, S. A. What does S. A. stand for?

Mr. Kohn: Society Anomaly. It means corporation.

The Court: And sales and sales prices of said shrimp by Crest Importing Company, Inc., for the period of time from the formation of Crest Importing Company to August 15, 1954; receipts of shipments of shrimp and sales of shrimp—well now, I think the volume of shrimp you are interested in. As to what they sold them for and what the measure of damages would be, and what the market price is, not what they sold them for. Maybe they

9 gave them away or maybe they sold them for more than they are worth.

Mr. Clinton: Aren't we entitled, Judge, on discovery, to look at those figures to see if they have any relationship?

The Court: I think you should have the records of all shipments of shrimp, yes.

Mr. Clinton: The sales price?

The Court: No, I don't think you are entitled to the sales price. It is up to you to prove damages by proving the value of the shrimp, and I think your man who knows the market on shrimp is competent to testify on that as anybody else. Anybody who is familiar with the market. As a matter of fact, I should think you would be able to stipulate the market price, Mr. Kohn. I do not see why we need to take time on that.

Mr. Kohn: We have some of the greatest experts in the country on it. Maybe we can.

The Court: I don't know why you can't stipulate it. Well, bring in all of the books and records showing what shrimp you got from Refrigeradora del Noroeste and when you got them.

Mr. Clinton: That is correct.

The Court: Between the time Crest started up to and including August 15th, '54, which the complaint says is
10 the termination of the contract.

Mr. Clinton: That is correct.

Now, Judge, could we amend that to include correspondence in connection with the shipments?

The Court: What?

Mr. Clinton: To include correspondence.

The Court: No. I just want to show how many you got in. I don't want to clutter this record up too much.

You understand what I am talking about now?

Mr. Kohn: We believe they ought to have that information from another source.

The Court: All right, we will give it to them again, then.

Mr. Kohn: In our answer to the interrogatories.

The Court: Whether it is or not, give, get those records and have them mailed in here.

Mr. Willis: Your Honor, we have a very complex accounting system here now. If I send all of these—

The Court: Can somebody take it off?

Mr. Willis: Yes, sir.

The Court: Show the dates you got them? How do you measure these, pounds or buckets or gallons?

Mr. Willis: Pounds.

The Court: How many pounds of shrimp you got on a given day?

11 Mr. Kohn: Would this be suitable?

The Court: And when you sold them.

Mr. Kohn: May I make a suggestion?

The Court: Yes.

Mr. Kohn: Could he telephone a CPA and have him make a tabulation?

The Court: His own will do.

Mr. Kohn: I mean his own CPA.

The Court: It is subject to their checking it later. Furnish it off your books. Your own bookkeeper can give you that.

Mr. Willis: All right, sir. You want the date of sale?

The Court: Date of sale and the date it was received and the quantity.

Mr. Willis: Yes, sir.

Mr. Clinton: I want to say, your Honor, we have no confidence in that kind of an arrangement based upon some—

The Court: I will tell you what I will do. I will give you the right to audit their books, if you show any irregularities they will be pretty harshly dealt with.

Mr. Clinton: Very well, your Honor.

The Court: You don't intend to furnish any false information in here, I hope?

12 Mr. Willis: No.

The Court: You have a right within 30 days of this trial to send a CPA in to audit their books if you want to and check any of the information that is furnished in answer to the subpoena, provided he comes within reasonable business hours.

Mr. Clinton: Could you make that 60 days? I am going to be in California.

The Court: All right. I will make it 60 days.

Mr. Willis: Your Honor, is it necessary that a competitor of Crest be allowed to inspect—

The Court: Only that portion, only that portion relating to the information that I am indicating here and any certified public accountant. I don't think you need to worry about them violating any trade secrets.

Mr. Kohn: If the Court please, I would like to voice an objection to prolonging the final entry of the judgment in this case for a period of sixty days.

The Court: Judging by the controversy that I have encountered thus far, it will go to the Court of Appeals anyway, whoever wins here. Your controversy will last longer than 60 days. Don't let it disturb you.

No. 4. Copies of contracts, agreements, and any preliminary drafts thereof existing between Crest Importing Company, Inc. and Exportadores Associados.

13 Mr. Kohn: We called that "E. A."

The Court: I am glad. Continue calling it that. Have you those with you?

Mr. Willis: Yes, sir. All those have been surrendered to Mr. Clinton. He had access to those yesterday.

The Court: Very well.

Mr. Clinton: That is No. 5.

The Court: No. 4.

No. 4 has been delivered. So you need to do nothing more on that.

Mr. Kohn: I just want to add this. Mr. Clinton, you are aware that Wilber Ellis document that you looked at?

Mr. Clinton: Yes, there is one document that we will want counsel to state on the record that was wrong, just for the purpose of the record.

The Court: Very well.

Mr. Clinton: We will not insist on that being included at this point.

Mr. Kohn: It was a form of contract used by another company. Had nothing to do with this case.

The Court: Very well.

Mr. Clinton: It had something to do with the antitrust case.

The Court: Five. All records—No. 5, all records
14 of Crest Importing Company, Inc., showing imports from and exports to Mexico of any shipments of merchandise, equipment or other physical property to and from Refrigeradora del Noroeste during the period from the formation of Crest Importing Company, Inc., to August 15, 1954, to Mexico.

I don't know why they want the imports to Mexico.

Mr. Clinton: I can tell you why.

The Court: Exports from Refrigeradora to Crest I have given you under No. —

Mr. Clinton: This is merchandise.

The Court: 2. What kind of merchandise?

Mr. Clinton: With reference to the material, certain boxes were sent, as we understand it, from Crest bearing the Crest label to Reno.

The Court: To who?

Mr. Clinton: To Reno or to E. A.

The Court: E. A.

Mr. Clinton: E. A. and Reno.

The Court: Who is Reno again?

Mr. Clinton: That is Refrigeradora del Noroeste.

The Court: Oh! That is what you call it.

Mr. Clinton: That is Reno. We want the dates of
15 that and quantities of it. It is extremely significant to the issues of this case.

The Court: Shipments from Crest to them?

Mr. Clinton: That is correct.

The Court: You mean shipments of shrimp from the United States to Mexico?

Mr. Clinton: No, labels. Like containers, like machinery. That is what we are interested in.

The Court: Well, you have an allegation in your counterclaim about sending down this—

Mr. Clinton: That is on a different matter.

The Court: Deveining machine and bread—that is the amended counterclaim?

Mr. Clinton: That has to do with a different phase of the case. We are interested in finding the amounts and the dates that Crest sent labels and containers and other merchandise to Reno. It becomes very material.

The Court: What is the materiality of it?

Mr. Clinton: As to their position to attempt to reinstate the contract. We contend they were in no position to do it. We believe the evidence will show—

The Court: Won't the shipments under shrimp show that? You know what they shipped you. You know what they shipped Crest, or you will know it, when you get what I told them to give you.

16 Mr. Clinton: The containers, labels, and other material would we believe, would have had to precede that.

The Court: What we are concerned with actually is how much shrimp they sold to Crest or gave to them or delivered.

Mr. Clinton: They deny, they deny that there was a breach of contract at that time.

The Court: Well—

Mr. Clinton: They said they reinstated it.

The Court: The contract with you?

Mr. Clinton: Yes. They say they reinstated it. We deny. And among other things we contend they couldn't reinstate it because they were committed to Crest irrevocably.

The Court: That would show by the papers I have already given to you.

Mr. Clinton: That would show the shrimp flowing in, but there would be dealings between these parties, we believe, prior to that time, in which labels and cartons would be sent down in advance of the shipment of shrimp and it is important to establish what the dealings were—

The Court: The only thing at issue is did they ship the shrimp to you or to these other people.

17 Mr. Clinton: One of the questions of fact—

The Court: That I am requiring them to disclose. Now, then, suppose now let us take your part of it, ... pletely.

Mr. Clinton: Yes.

The Court: Suppose they shipped enough cartons to contain, let us say, for example, 500 tons of shrimp and their total output is 100 tons of shrimp. Are you then going to present evidence that since they sent boxes for 500 shrimp, although their record shows only 100 tons was shipped to Crest, that this is evidence there were another 400 tons?

Mr. Clinton: That is not the fact to which I am directing my attention.

The Court: What is the fact?

Mr. Clinton: The fact is this: When Reno says that it was not committed to Crest in September and October of 1953, that is a false allegation.

We propose to introduce various evidence to show the relationships between Reno and Crest, constituted an arrangement where they couldn't have reinstated their contract and among the facts which we propose to introduce is that it was never intended to send shrimp to Reno, I mean to Penguin, as they would contend here, and that
18 all the arrangements were made, actually made, for the delivery of the Reno shrimp in Crest cartons in the month of September or August or earlier, and that they were not in a position to and all their plans looked forward to giving our shrimp to Crest.

The Court: I don't see what cartons and merchandise they shipped down there is going to prove that point.

Mr. Clinton: It shows what the arrangements were in that they were not in good faith when they said they were going to ship that stuff.

The Court: I am sorry. I don't follow you. Item 5 will be denied.

Mr. Clinton: We except to that.

The Court: Item 6. Now, we get to this thing here. Employment contracts or agreements, guaranteed or other agreements between John Willis and Crest Importing Company, Exportadores Associados, and Nacional Financiera.

Now, suppose while you are picking the jury I read this file. All of that is in here?

Mr. Kohn: Yes.

The Court: The whole thing?

Mr. Kohn: Yes.

Mr. Clinton: Does your Honor want to hear a statement from me?

The Court: Sure. Before I read this. Now, he has
19 got that. He has got Item 6 here. The question is, shall I give it to you. Is that right?

Mr. Kohn: Yes.

The Court: Yes.

Mr. Willis: May I say something?

The Court: You say something and then I will hear from Mr. Clinton.

Mr. Willis: I have another file with me which consists of letters to and from various attorneys in connection with this case, including my own. That is the only other file I have here. It includes in it a letter that was mentioned this morning.

The Court: Well, suppose you give me that too then. That would come under No. 6, would it?

Mr. Willis: No, sir, no, sir.

Mr. Kohn: Mr. Clinton—

The Court: Say it again slowly. He is doing well without counsel. You go ahead.

Mr. Willis: I have a letter or a file which I think was privileged because it was to and from attorneys. I know nothing about law.

The Court: That is where you are lucky.

Mr. Willis: I have that file with me. The file has mainly to do with this case. It has nothing to do with the organization of Crest.

20 The Court: Does it have anything to do with your employment contract?

Mr. Willis: No, sir.

The Court: But it is legal advice that you had at the time of the forming of the company?

Mr. Willis: No, sir. It only has to do with the case that you are trying now.

The Court: Well, no, I don't think that is material. Is everything pertaining to your employment contract or agreement or guarantees or other agreements between you and you employer, Crest Importing Company, The E. A. and the Nacional Financiera all in here?

Mr. Willis: Yes.

The Court: All right. This is Item No. 6. I will hear what you want to say about it, and while you are picking the jury, among other things, I can be reading Item No. 6. I have ruled on all the others. You understand my ruling and you will comply with it.

Mr. Willis: Yes.

The Court: Call your office this afternoon for those other items.

Mr. Willis: On the sales tabulations of our own accountant showing the receipts and the date of sale, will be sufficient?

The Court: Date of sale, date of receipt, and quan-
21 tity.

Mr. Willis: Yes, sir.

The Court: Quantity.

Mr. Clinton: The records will be here. You are talking about this tabulation your Honor is going to take off?

Mr. Willis: I am talking about what Judge Campbell asked me to get.

Mr. Clinton: You heard the Judge and I heard him.

The Court: What is it? I told him to have his auditor take off this tabulation.

Mr. Clinton: Very well.

The Court: You do that, and I expect you to certify to its genuineness.

Mr. Willis: Yes, sir.

The Court: And if it is later liscovered within 60 days not to be genuine, I will have to deal pretty harshly with the situation.

Mr. Willis: Yes, sir.

The Court: Other than that, I never require the dragging in of all of the financial books and records, particularly in a jury case, where we can get such a statement drawn off with the material information. All right. You understand what it is I want.

Now, you want to be heard on Item 6, Mr.
22 Clinton, as to whether or not I will deliver it to you?

Mr. Clinton: Yes.

The Court: I will hear you now. I have it now.

Mr. Clinton: All right. I want to make this point to you, your Honor: That employment material is of utmost importance to the defense in this case because one of the conditions that Mr. Willis imposed, as appears from the file in accepting the head of Crest was that Reno be included, Reno production be included in this syndicate; and the evidence will show that he indicated he would not accept the Crest position unless Reno was included.

The depositions indicated that when he heard Reno might not be included he regarded it as a catastrophe. Now, we are, I think, entitled to show and to get into those records to show that that was one of the conditions that he

specified as to his employment and that he went ahead with it on that basis. It is very material.

The Court: I will keep that in mind when I am reading that. Do you want to make any observations?

Mr. Kohn: Not on that. I don't represent Mr. Willis. I don't know what is in the contract but if the Court should find that there are things that are relevant that Mr. Clinton is entitled to, I would ask the Court to block out
23 matters as to salary and confidential matters.

The Court: They are his records. He may not want it.

Mr. Kohn: We discussed this yesterday.

Mr. Clinton: We are not interested in his rate of compensation.

The Court: Probably those documents can be removed. I understand what you want. I will read this. I will determine whether it should be turned over.

Mr. Clinton: There is just one other thing and I will have done.

The Court: All right.

Mr. Clinton: I ask your Honor to direct the witness to produce correspondence in connection with these shipments, the first shipments from Reno, the Reno shipments to his company.

The Court: That is what I am telling him to draw off.

Mr. Clinton: In the correspondence.

The Court: The correspondence about the shipments.

Mr. Kohn: That is not asked for.

Mr. Clinton: It was in the—

Mr. Willis: May I offer this wire as a partial answer to Mr. Clinton? We are trying to cooperate.

The Court: What is it? You read it to me.

Mr. Willis: (Reading.)

24 "Reno shipped 4 cars October; 8 cars November; received 2 cars October, 7 cars November. First shipment October 20th."

All I want to do is to get back to work.

The Court: Yes. We want to get you back, too.

Mr. Kohn: I don't think Mr. Clinton heard you.

The Court: Show him the telegram. This is the first shipments that have come from Reno to you, is it?

Mr. Clinton: I can't accept that.

Mr. Willis: You asked for it yesterday.

Mr. Clinton: I know, but I want the records. I don't want wires.

The Court: What I have directed them to give is the shipment of shrimp. This is partially an answer to it.

Mr. Willis: Mr. Clinton asked me for this yesterday.

The Court: Shipments of shrimp as shown here up until August 15, 1954 from the time you were organized up until August 15, 1954, of all the shrimp you received from what do you call them?

Mr. Willis: Reno.

The Court: The date you received them, the quantities and the date they were sold.

Mr. Willis: Yes, sir.

The Court: Get that off your records and that is all. The request for the correspondence is denied.

25 Now, I will rule on Item 6. Who is going to pick the jury, Mr. Clayton?

Mr. Clinton: Yes, with your Honor's permission I will withdraw.

The Court: Yes. Has he filed his appearance?

Mr. Clinton: Yes, I think he has.

The Court: You are going to withdraw, Mr. Clinton?

Mr. Clinton: Yes, your Honor.

The Court: Leave granted. You better wait around for my ruling on Item 6, hadn't you? Mr. Clayton will receive that?

Mr. Clayton: Yes.

The Court: Who is going to pick the jury for the plaintiff?

Mr. Kohn: I will.

The Court: All right, Mr. Clayton and Mr. Kohn, st over here a minute. You go and get the venire.

Mr. Clinton: I am excused, your Honor.

The Court: You are excused, Mr. Clinton. You understand, Mr. Willis, my ruling, and you will comply with it?

Mr. Willis: Yes, sir.

26 The Court: Counsel will step to the bar.

With respect to Item 6 on the subpoena duces tecum —where is Mr. Willis?

On the subpoena duces tecum, I have read this file, with the exception, Mr. Clayton, of possibly one of two ultimate facts which I think plaintiff would be willing to stipulate to, I find nothing material to the issues in this case or admissible that I would permit into evidence.

On the other hand, as the case goes along, some of the

conclusions which might be drawn from some of these documents in No. 6 may become material.

Now, with that in mind, and in a desire to be fair to both sides, I am going to permit you, Mr. Clayton, alone—you, I understand, are taking over from Mr. Clinton in the labor oar here. You are going to try the case, is that right?

Mr. Clayton: Yes, together with my associates.

The Court: You two together may review this file tonight as officers of the Court, and under the strict admonition that you are not to reveal any of its contents to your client or to anyone else.

Now, you are to return it to the Court tomorrow morning. It will be here before the Court during the duration of
27 the trial. If it becomes necessary in your opinion to use any of this, I will hear you at that time. You cannot very well form such an opinion, however, until you read it.

You do so under the admonition that as officers of the Court it is to remain a secret between you and the Court.

Mr. Kohn: If the Court please, Mr. Willis has a request to make of your Honor. It is merely a request, and I am stating it for him.

He would like, if possible, to have the amount of his annual compensation and the duration of the contract, if possible, concealed by using tape. We did that yesterday on one document relating to the percentage.

The Court: I don't think that is necessary. Counsel will not reveal it.

Mr. Kohn: Neither to their client or to other counsel.

The Court: You just heard the admonition. I think you need have no worry on that. That is right, nor anyone else: your client or anyone.

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1 IN THE UNITED STATES DISTRICT COURT.
• • (Caption—53-C-2482) • •

Transcript of proceedings had and evidence taken on the trial of the above-entitled cause before the Honorable William J. Campbell, one of the Judges of said Court, and a jury, in his courtroom, United States Court House, Chicago, Illinois, on Tuesday, June 7, 1955, at 2:00 o'clock p.m.

Present:

Mr. Louis A. Kohn, Mr. Cornelius B. Kennedy, and Mr. Patrick O'Brien, appeared on behalf of the plaintiff;

Mr. Robert A. Sprecher and Mr. Joseph Clayton, appeared on behalf of the defendant.

2 The Court: Gentlemen, I understand the jury now in the box is satisfactory to both sides; is that correct?

Mr. Kohn: That is correct, Judge.

Mr. Clayton: That is correct, Your Honor, for the defendant.

The Court: Very well, let the record so show.

The jury may rise and be sworn.

(Jury sworn.)

Be seated.

Opening statements, not to exceed fifteen minutes per side, will be heard.

Plaintiff may give its opening statement.

Opening Statement on Behalf of Plaintiff by Mr. Kohn.

Your Honor, counsel for defendant, ladies and gentlemen of the jury.

As you have heard from the questions propounded to you and statements made principally by myself and Mr. Clayton, the plaintiff in this case is a corporation—for which we will use and are using the name Reno as an abbreviation—which has its principal place of business in Mazatlan on the West Coast of Mexico.

It is engaged in the business of importing or exporting to the United States shrimp.

The defendant, beginning sometime in 1950, became
3 the distributor in this country of the shrimp to be processed and sold by the plaintiff. On or about October

19, 1950, a contract was entered into governing this relationship. It provided in substance, and we will go into the details of the provisions later, for the sale to the defendant of substantially all of the output of the shrimp processed and obtained by the plaintiff.

During the 1950-1951 season—the shrimp season starts in August generally and runs on through, October I mean, and runs through June. Under the terms of the contract, it was to go on from year to year unless cancelled on a certain date, and by the terms of the contract, which was not cancelled, it also covered the 1951-1952 season.

Then in July, 1952, a new contract was entered into which substantially incorporated all of the provisions of the 1950 contract, and the witnesses will discuss the two or three minor differences, as the case may be.

Now, under the contract, the defendant was to remit and to account for the sales. It was to receive a certain percentage of the proceeds of the sales. These reports or sales were to be made monthly; I believe it was the 15th of each month.

It was also to remit to the plaintiff for the purchase price as these carloads of shrimp which were shipped to this country were sold.

4 The relationship continued satisfactorily throughout the first two seasons, and then came the 1952-1953 season. In February of 1953, the plaintiff, assuming it had a right to cancel the contract, because of the fact it had been advised by its Mexican attorneys that it had the right so to do, gave notice of cancellation of the contract—taking the position that the extension agreement for two years was invalid, and that it had the right to give a cancellation in accordance with the terms of the 1950 contract.

Relying on that advice, it considered new methods, new plans for distribution of the shrimp in the United States.

The defendant was unhappy about this information, although not at all times, but between the period of February and September, 1953, there were various discussions back and forth which culminated in a conference in Chicago in which it was concluded by both sides to go ahead with the contract.

Thereafter, demands were made by plaintiff for payment to it for the sums that were due it by the defendant, Mr. Appelbaum, with the result that no payments were made as requested, with the result that demands were made by Mr. Appelbaum for the furnishing of security that

further shipments would be made to him, although there was no such provision in the contract; with the result that there were telephone conversations, wires—which we will introduce in evidence—whereby the plaintiff demanded the payment of the sums due it.

The defendant refused to pay and notices of cancellation were given, and the contract was regarded as terminated by the plaintiff, and for the next season—that is, 1953, beginning October, 1953, and on into 1954, shipments were made elsewhere.

The amount of the claim of plaintiff is well in excess of over $200,000.00. That is not including interest. Approximately $199,000.00 is admitted by the defendant as being the amount of credit to which the plaintiff is entitled on the defendant's books. We find fault with that figure and object to the deductions made by defendant on account of certain breading transaction which is the basis of the counterclaim asserted—one of the claims asserted in the defendant's counterclaim. We deny that there was any such contract.

There were also other deductions totaling between Six and Seven Thousand Dollars which we claim were improper.

So the amount of our principal claim, and the evidence will support it, we believe, will run well over $200,000.00, approximately $210,000.00, not including interest.

We submit that the evidence will further show clearly, and the facts are highly in controversy, that we are entitled to this amount of over $200,000.00 and approaching $210,000.00, not including interest.

The defendant's only defense is that we wrongfully terminated the contract.

Our answer is to that, as to the first termination that that was revoked. The defendant did not act on it. Under the law, the parties have a chance before the due date for performance occurs to get together and agree to go on with the contract.

That is what occurred in Chicago in September of 1953, as the evidence will show.

Thereupon the defendant refused, although stating he wanted to go on with the contract, to make the payments; and, as the old saying goes, if one wants his cake, he must pay his penny. That the defendant refused to do.

We therefore submit, and the evidence will show, that there has been no breach of contract on the part of the

plaintiff. And, as regards this incidental matter of the breading contract, we deny that any such existed, or that the plaintiff is liable in any way for any alleged breach of any such oral—mind you, an oral contract is all that is claimed here.

We therefore submit that we are entitled to a verdict, not only on our complaint, but also a finding for plaintiff's favor on the counterclaim as well.

Thank you very much.

The Court: The defendant's opening statement. Mr. Clayton.

Opening Statement On Behalf of the Defendant.

By Mr. Clayton:

May it please Your Honor, counsel for the plaintiff, ladies and gentlemen of the jury.

You just heard Mr. Kohn tell you briefly what they expect their evidence—

The Court: Will you speak a little louder, please? I can't hear.

Mr. Clayton: Yes.

By Mr. Clayton: (Continuing.)

You have just heard the plaintiff's attorney, Mr. Kohn, tell you briefly what he expects the evidence to show on behalf of the plaintiff.

At the outset, of course, I want to caution you that whatever counsel representing the plaintiff says in his opening statement, or whatever we say in our opening statement as to what we expect the evidence to disclose, is given to you merely for the purpose of giving you a bird's eye view of what you can expect. And, you can bear that in mind as you listen to the various witnesses who testify.

8 However, if what we tell you in our opening statement is not borne out by the evidence, of course the Court will instruct you that it is your duty to disregard it.

With respect to the defendant, we expect the evidence to disclose, as Mr. Kohn told you, that the plaintiff, a Mexican, a foreign corporation, was engaged in the business of producing, packing, processing, and selling shrimp from the West Coast of Mexico. He told you where their office is located, and we expect the evidence to so disclose that.

We expect the evidence to disclose that the defendant in this case in 1950, at the time that counsel mentioned, was

engaged in the business of distributing shrimp in the United States, and that he did enter into a contract with the plaintiff.

They refer to the plaintiff as Reno, the name being Refrigeradora del Noroeste. And, the firm name of the defendant at that time was the Penguin Frozen Food Company.

We expect the evidence to disclose that they had certain contractual relations, and that this contract was in existence for a period of time, and you will be told by the witnesses and by documents just the terms of that particular contract.

We expect the evidence to disclose that the contract provided that, among other things, that the original
9 contract, that the—a certain percentage of the sale price was to be the price charged the defendant for the distribution of the shrimp, and that the plaintiff was to deliver or turn over to the defendant all of the shrimp which would be processed and to be sold in the United States, and that he, the defendant, was to distribute, of course, their product in the United States and the Dominion of Canada.

However, there was a provision with respect to the fact that ten per cent of the plaintiff's production would be sold in the Republic of Mexico. The laws of Mexico provided that they were not to export as much as 90% ; that the contract would have to deal with the laws of Mexico. And, that Mr. Appelbaum, the defendant, proceeded to do business and got customers here in the United States and in the Dominion of Canada.

And he did invest large sums of money towards the distribution of the shrimp for the plaintiff, referred to as Reno.

Then, in the advertising and so forth, he naturally had to outlay money, and even when the contract was entered into, we expect the evidence to show, that he entered into it in good faith and advanced the plaintiff approximately $68,000.00, and the contract provided for the number of these payments.

10 This contract continued, and for some reason or other we expect the evidence to show that certain persons connected with the plaintiff corporation, either because of a desire to get the profits which the defendant was making, or because of their not caring for the defendant to have this exclusive distribution of contract in

the United States, proceeded to set-up other organizations whereby they thought that by devious means they would be able to get around this particular contract which had been entered into.

We expect the evidence to disclose that while knowledge of that fact was called to the attention of the defendant, he, of course, still complying with the contract and in good faith—not dreaming that anything was attempting to be done—continued the distribution of shrimp.

We expect the evidence to disclose that he built up a large and very profitable clientele here in the United States and in the Dominion of Canada. That he received the shrimp from the plaintiff corporation.

That at the time of this extension agreement, which had been entered into as counsel stated, subsequent to that time, the plaintiff decided that they would cancel the contract; the reason being, they say, was because they thought that they had a right to cancel it.

Notice of the proposed cancellation was sent to the
11 defendant, and we expect the evidence to disclose that he contacted them and told them that his contract ran for a later date; they did not have the right to cancel.

Of course, he was apprehensive, not knowing what they were going to do, and their home office was in Mazatlan, Mexico. He wanted to insure his customers here that he would continue to furnish them the shrimp that he had been furnishing them.

He, of course, attempted to contact them and let them know that they didn't have the right to cancel the contract, so that he could continue with his distribution of shrimp.

We think that the evidence will disclose that there were many communications from them from the date of the receipt of the first in February up to and including the latter part of August. All of them ignored his contention to the effect they didn't have the right to cancel, and they were going to cancel the contract anyway.

We expect the evidence to disclose that at the same time the plaintiff corporation, or the person that was interested in the plaintiff corporation in this case, had caused to be formed an association of these shrimp producers on the West Coast of Mexico, and that they had caused an association to be formed known as Exportadores Associados, referred to as E. A., whereby this group of shrimp
12 producers entered into an agreement—into a contract with this export association, E. A., as we will refer

to it, whereby they agreed to sell E. A., this export company, all of their supply of shrimp. They, in turn, were the persons who formed or owned the stock of that export association.

Then they caused to be formed in the United States a corporation known as the Crest Corporation, the Crest Corporation having entered into a contract with the E. A. Corporation, that is the export company in Mexico which is controlled by this group of West Coast shrimp producers.

They gave all of their shrimp to the export company, the export company having a contract with Crest, whereby they would deliver to or sell only to Crest Company, who would distribute the shrimp in the United States.

So, with that arrangement in mind, those various corporations having been formed, the plaintiff didn't figure that they would have to worry with the defendant, Mr. Appelbaum, who had a contract with Reno for the sole distribution of the shrimp.

We expect the evidence to show that devious and various means and methods were used in the setting up of these companies, so that we wouldn't be able to trace directly the connection that the plaintiff here had with them,
13 even though it was a great producer of processed shrimp on the West Coast.

We expect the evidence to show interested in this E. A. corporation was the plaintiff, and was sending its supply to the E. A., rather than to the defendant corporation here in the United States.

We expect the evidence to show that even though the defendant met with them on various occasions and communicated with them, and they, in turn, communicated with him, that it all ended up with the same note; that we don't consider ourselves contractually bound, and that at the beginning of this season you are through—words to that effect.

In September of 1953, there was a meeting in Chicago, and we expect to show that officials from them, I think the Nacional Financiera, referred to as N. F., that was the financing agency of Reno, the plaintiff in this case, together with other officials and their lawyers from New York came to Chicago because the defendant had insisted that they couldn't break the contract: that he had a contract that was running into another season.

He was apprehensive, because he had these various commitments. When they came into this meeting, they

wanted to buy him out, or words to that effect: get
14 rid of him. Because, it had been expressed by some of the persons connected with the plaintiff, using their terminology, that to permit the contract with the defendant to continue in existence would be catastrophic.

So, they had to get rid of him.

We expect the evidence to show that various propositions were made to the defendant here, he telling them that he having had these commitments to these various customers, he wanted to know if he made any proposition with them, would he be able to get shrimp to still supply them with, or what he would do with his clientele.

Of course, they weren't interested in that.

There were various counter-proposals, and proposals were made, and they finally told him that they agreed that they couldn't legally breach the contract. Then the question was, what could be done.

We expect the evidence to disclose that by this time, prior to that time, being a good businessman, he had checked and he had found this arrangement that I have just mentioned to you that we expect the evidence to disclose between a group of shrimp producers on the West Coast of Mexico, having formed this export corporation where they owned the stock—they having a contract to give their entire supply to them.

15 And, we contend that the plaintiffs were in on that, also, and that this export company would sell only to Crest, which was set up at the instance of these people connected with plaintiff and the West Coast producers, to bypass the defendant; and that they had actually started doing business together. They didn't— Because they felt that they didn't have to be bound by their contract with the defendant.

We expect the evidence to disclose that back in 1952 when the contract was extended, there was an agreement entered into by the persons representing Reno and the defendant, whereby they were going to bread shrimp in the off seasons for the defendant; and they agreed upon a charge that would be made for the services for the breading of them.

That, pursuant to that agreement, it was agreed that the defendant in this case here would—it would or there would be set up a Mexico corporation to finance it, and that they would alter, to a certain extent, the financing as provided in the original contract, so that this other contract

for the breading of the shrimp would or could be carried out by the defendant financing that.

The particular details, of course, will be told to you by the witnesses, and there will be documents to sub-
16 stantiate that.

The defendant in this case, relying upon the integrity as he thought of the men that he was dealing with, being the good businessman, in word he was bound, he proceeded to act on this provision of this oral contract.

Expect also the evidence to disclose that pursuant to him entering upon this new venture with them, he met with one of the officials down in Dallas, Texas, and there they discussed it. And then, they also met in Mexico to see one of the plants where the shrimp would be breaded.

The Court: Your fifteen minutes has expired, Mr. Clayton. I will give you two minutes in which to conclude.

Mr. Clayton: Yes.

By Mr. Clayton: (Continuing.)

That a large sum of money was advanced in the purchasing of cartons, and equipment, and deveining machinery, and so forth, and that he was to receive an amount for the operation of that breading shrimp if he was to be permitted to continue in the distribution of it, that would have net him $100,000.00 during that year.

They, having become provoked because they say that they couldn't cancel the contract legally, they then stated to the defendant that they would consider going through with the agreement, and the defendant then wanted to
17 know of what assurance he would have that they would do it. They had breached it. They had breached the other agreement, and then he wanted certain guarantees, that is, certain assurances that even though they stated that they would continue to ship shrimp to him as they had, that they would do it.

He requested some assurance from N. F., that is, Nacional Financiera; they wouldn't assure him that the plaintiffs intended to go through with the contract.

An attorney representing them wouldn't insure it.

He at all times told them that, "If you give me this assurance, then we can do business."

That they failed to do. We contend as a result of that breach, he sustained damages to the extent of over $200,000.00.

With respect to this breading of shrimp process where he invested large sums of money in good faith and was in

a position to go through with it, he lost profits up to $100,000.00 and about $13,000.00 or $14,000.00 in cash which he expended by way of machinery, cartons, and supplies for the operation of it.

They having breached their agreement, we feel that the evidence will warrant your bringing in a verdict both for the defendant on the claim and in his favor on the
18 counterclaim in a sum of around $367,000.00.

The Court: The jury is instructed at this time that they are not to discuss this case among themselves, nor with anyone else; nor are they to arrive at any conclusions on any issue in the case until they have heard all of the evidence on both sides, the arguments of counsel, and the instructions of the Court. In other words, until that time when you will retire to your jury room to deliberate upon your verdict, you are to maintain an open mind in the matter.

With that admonition, you will be permitted from time to time to separate.

You will be excused at this time until 10:00 o'clock tomorrow morning. The jury is excused until that time.

Counsel will remain.

(Whereupon the following proceedings were had in open court out of the presence and hearing of the jury:)

The Court: Do you think you will get the plaintiff's case in tomorrow morning?

Mr. Kohn: Yes, sir.

The Court: And then you will be prepared to start immediately? How long do you think defendant's case will take?
19 Mr. Clayton: Three days.

The Court: I was advised originally about one week would be required for this case in its complete entirety, and I am allowing one week for it.

Mr. Kohn: If the Court please, you said tomorrow morning. That is the time required for me to produce the two witnesses on our main case. I can't tell about the cross-examination.

The Court: Well, Mr. Clayton is usually pretty quick on cross-examination.

Mr. Kohn: And, in order to save time of the Court in the morning, if it isn't too late now, I have documents that are not objected to we would like to read into the record. I don't believe there is any necessity—

The Court: Read into the record?

Mr. Kohn: I mean introduce into evidence. These are the result of motions of both parties.

The Court: Under the rules of procedure, you have to offer them while the jury is in the box; otherwise they are not part of your record.

I can tell you what you can do this afternoon, have them all marked.

Mr. Kohn: That is what I meant.

The Court: Why don't you do that? Have them all marked and be ready. And, since there is no objection to them, in the morning just offer Plaintiff's Exhibits 1 through 25, whatever it is.

Mr. Kohn: That is what I had in mind. There are documents on both sides to be admitted.

The Court: Fine.

Mr. Clayton, acquaint yourself—you are familiar with it anyway—with the rule that was issued on both sides at the pre-trial conference as to no pro forma proof of documents. I will hear argument as to admissibility and materiality, but there was a rule on both sides to exhibit any documentary evidence they intended to introduce to their opponent.

But, I don't want time taken up with pro forma proof. As we go along, also, where in fact it becomes apparent from the testimony of a witness that it is something you can stipulate to, do so, so as to shorten the time.

We will adjourn now until 10:00 o'clock tomorrow morning.

(Whereupon an adjournment was taken in the above-entitled cause until Wednesday morning, June 8, A. D. 1955, at 10:00 o'clock.)

Before Judge Campbell, and a jury, June 8, 1955, at 10:00 o'clock a. m.

Court convened pursuant to adjournment.

Present:

Mr. Louis A. Kohn, Mr. Cornelius B. Kennedy, and Mr. Patrick O'Brien, appeared on behalf of the plaintiff;

Mr. Stanford Clinton, Mr. Robert A. Sprecher, and Mr. Joseph Clayton, appeared on behalf of the defendant.

The Clerk: No. 53 C 2482, Refrigeradora *vs.* Appelbaum.

Mr. Kohn: Mr. O'Brien has some documents if you remember. We were going to read them into the record first.

The Court: Yes. Go ahead and bring in the jury.

(The following proceedings were had in the Courtroom in the presence and hearing of the jury.)

Mr. Kohn: May it please the Court, in order to save time, I will proceed without Mr. O'Brien.

The Court: Here he is now.

Mr. Kohn: Oh. May it please the Court, the plaintiff is now ready.

The Court: You may proceed.

Mr. Kohn: First of all I would like to introduce into evidence 17 documents which have been admitted by both sides as being genuine. The first of those documents is the basic contract, dated October 19, 1950, between the plaintiff and Penguin Frozen Foods, Inc. I have here the original and it is agreeable with both parties that the copy that has been conformed and checked be introduced into evidence and are now offered as plaintiff's Exhibit 1 for identification.

The Court: It may be received.

(Said document so offered and received in evidence was marked PLAINTIFF'S EXHIBIT NO. 1.)

Mr. Kohn: Being a photostat that has been approved by both parties with Mr. O'Brien. May I ask you to read to the jury paragraphs 1, 4, 8, 11(b), and 15 and 18 and if the defendant desires we will read the other paragraphs.

The Court: They can on their case.

Mr. Kohn: I mean if he desires it now, even at this time.

Mr. Clayton: If your Honor please, at this time we would like to move that all witnesses be excluded.

The Court: Yes. Motion to exclude all witnesses except the principal and a party on each side who will be working with the lawyer. All the witnesses may go to the witness room.

Each side see that their own witnesses remain in the witness room until needed.

Mr. Kohn: I have one other witness here.

The Court: Just watch for him when he comes in and send him to the witness room. Do you want to read the contract?

Mr. Kohn: Not all of it, just certain excerpts.

The Court: All right.

Mr. O'Brien: Paragraph 1 of the contract dated October 19, 1950 reads as follows:

"It is hereby agreed by and between the parties hereto as follows:

(1) Seller hereby agrees to sell to Buyer, and Buyer hereby agrees to purchase "from Seller, all shrimp which are caught or purchased and packed and frozen by Seller during the period beginning on the date of this agreement and ending August 15, 1951; provided, however, that Seller shall not be obligated to sell any shrimp processed but not owned by Seller, or any shrimp caught or purchased and packed and frozen by Seller which are sold by Seller for consumption in the Republic of Mexico, and provided, further, that the combined aggregate of the shrimp which Seller shall not be obligated to sell shall be no more than ten per cent. (10%) of the shrimp packed, frozen or processed by Seller during the term of this agreement unless the laws of the Republic of Mexico hereafter require Seller to withhold from export, for sale in Mexico, an amount in excess of ten per cent. (10%) of the shrimp packed, frozen or processed, in which event Seller shall not be obligated to sell to Buyer the amount of shrimp required by the laws of the Republic of Mexico to be withheld from export, for sale in Mexico."

Paragraph 4 of this agreement reads as follows:

"(4) The purchase price for the shrimp "sold by Seller to Buyer hereunder shall be an amount equal to ninety-three (93%) of the amount for which each pound of shrimp delivered to Buyer is re-sold by Buyer, payable as hereinafter provided."

Paragraph 8 of the contract of October 19, 1950 reads as follows:

"(8) Seller covenants and agrees that all shrimp sold hereunder shall fully comply with all applicable Pure Food Laws and Regulations of the United States of America and the Republic of Mexico, and Seller further agrees that each shipment of shrimp sold hereunder shall be accompanied by a Mexican public health department certificate and any shipping authorization required by any administrative body of the Republic of Mexico having jurisdiction over the exporting of shrimp from Mexico."

Mr. O'Brien: 11(b). Now, paragraph 11 starts out as follows:

"(11) The purchase price for the shrimp sold hereunder shall be paid as follows:"

Now, paragraph 11(b) reads as follows:

"(b) Buyer agrees to deliver to Seller on or before the 15th day of each month during the term of this agree-
26 ment and on or before the 15th day of each month during the term of this agreement and on or before the 15th day of September, 1951, a report in writing, verified by an officer of Buyer, setting forth (i) the name and address of each person, firm or corporation to whom Buyer has, during the preceding month or lesser accounting period, if the period covered by such account be less than one month, re-sold shrimp purchased by it hereunder; (ii) the date of each such sale; (iii) the sale price at which such shrimp were sold; (iv) the number of pounds of shrimp sold to each purchaser; (v) the size (and any other grade or classification) of shrimp in each sale; and (vi) the identification of the shipment or shipments by car number, invoice number (and/or other means of identification) involved in each sale. Simultaneously with the delivery of each such report referred to in this subparagraph, Buyer agrees to pay to Seller the balance due from Buyer to Seller on all sales made by Buyer, as disclosed by such report. The amount of such payment shall be arrived at by adding to the purchase price (i. e., 93% of the price
27 at which such shrimp is sold by Buyer) all amounts advanced by Seller as agent for Buyer, as provided in Section 6 of this agreement,"

And the rest of that paragraph deals with other amounts that may be deducted by the Buyer.

Paragraph 15 of this agreement that is in evidence as Plaintiff's Exhibit 1, provides as follows:

"Buyer agrees that Seller or its agents may, at any and all reasonable times during the term of this agreement and for sixty (60) days thereafter, have access, during business hours, by a duly authorized representative or representatives, to any and all books and records of Buyer which in any way pertain to the subject matter of this agreement, including (without in limitation thereof) the sale by Buyer of the shrimp purchased by it from time to time hereunder, the expenses and charges incurred by Buyer, and any and all expenses and charges incurred by Buyer, and any and all other items of income or expenditure in any way connected with the shrimp sold hereunder."

Paragraph 18—and before I get there I would like to read paragraph 17 of Plaintiff's Exhibit 1.

28 "(17) Seller agrees that Buyer shall have the right, at its expense, to station a duly authorized representative of Buyer in Seller's plant in Mazatlan, Sinaloa, Mexico, throughout the term of this agreement, to examine and spot-check not to exceed ten (10) five-pound packages selected out of each shipment of shrimp sold to Buyer. Such examination and spot-check may include completely thawing, weighing, counting and scrutinizing the shrimp in the packages so selected."

The last paragraph 18. I would like to draw your attention to paragraph 18 and that provides as follows:

"(18) The first contract year under this agreement shall expire on August 15, 1951, and each succeeding year (if any) shall be from August 16th to the succeeding August 15th. The parties hereto agree that this agreement shall be deemed to be automatically renewed by the parties hereto for each successive contract year, and from year to year thereafter, with all appropriate changes in dates to fit each successive contract year, in the absence of notice by either party to the other given not later than March 1, 1951, and, if renewed, not later than March 1st of

29 any calendar year thereafter, to the effect that this agreement shall not remain in effect for successive contract years."

Mr. Kohn: Is that all, Mr. O'Brien?

Mr. O'Brien: Yes.

30 Mr. Kohn: If the Court please, I would like now to offer in evidence Plaintiff's Exhibit No. 2 marked for identification, being the original Spanish, July 21, 1952, so-called extension agreement between the parties.

The Court: It may be received.

(Whereupon said document marked PLAINTIFF'S EXHIBIT NO. 2 for identification, was received in evidence.)

Mr. Kohn: I now offer in evidence Plaintiff's Exhibit No. 3 for identification, which is a translation of the document which is referred to, and I would like to have Mr. O'Brien read the certain paragraphs.

The Court: It may be received.

(Whereupon said document marked PLAINTIFF'S EXHIBIT 3 for identification, was received in evidence.)

Mr. O'Brien: This is a letter dated July 22, 1952,—that is, Plaintiff's Exhibit No. 3 is a letter dated July 22, 1952.

This letter is addressed to Penguin Frozen Foods, 120 So. LaSalle Street, Chicago 3, Illinois. It is signed by Refrigeradora del Noroeste, and agreed to by the Penguin Frozen Foods.

31 (Reading):

"In agreement with the conversations which we have had with your representative, Mr. Henry Appelbaum, we declare to you that we comply with—"

This translation is rather stilted, but I will read it:

(Continuing Reading):

—"we declare to you that we comply with extending our contract of the sale of shrimp of October 19, 1950 with that firm (i.e. Penguin Frozen Foods,) for a term of two years, being able to be newly extended at the will of both parties, retaining the same specified conditions in the mentioned contract,—"

That is, the contract of October 19, 1950—

—"only with the following modifications:

"a)—the price at which shrimp will be sold to Penguin Frozen Foods will be at 95 per cent of the prices in force, during the next period.

"b)—the price at 95 per cent will be always when

32 Penguin Frozen Foods does not give and advance in money to Reno and this last finances with its own resources or with credits not proceeding from Penguin Frozen Foods their transaction."

That is, Reno is the plaintiff.

"c)—In the case that Reno can not finance directly or obtain financing outside of Penguin Frozen Foods, the latter will finance, but in this case the price of sale would be 93 per cent.

"d)—If Penguin Frozen Foods should buy shrimp from other producers distinct from Reno, it requires the prior approval of this last firm."

Mr. Kohn: Thanks.

If the Court please, I now offer in evidence Plaintiff's Exhibit 4 which is a wire from Reno to the defendant, dated February 25, 1953, and will be referred to as the first notice of termination.

The Court: It may be received.

33 (Whereupon said document marked PLAINTIFF'S EXHIBIT 4 for identification, was received in evidence.)

Mr. Kohn: The next item is a wire from the defendant

to plaintiff, dated February 26, 1953, which is Plaintiff's Exhibit 5 for identification.

The Court: It may be received.

(Whereupon said document marked PLAINTIFF'S EXHIBIT 5 for identification, was received in evidence.)

Mr. Kohn: The next item is a letter dated July 17, 1953, from plaintiff to defendant, addressed to defendant at the hotel—

Is that the Hotel Belmar?

Mr. Pinson: Delmar.

Mr. Kohn: I thought it was the Belmar in Mexico City.

The Court: Delmar.

Mr. Kohn: That is Plaintiff's Exhibit 6, for identification.

The Court: It may be received.

(Whereupon said document marked PLAINTIFF'S EXHIBIT 6 for identification, was received in evidence.)

34 Mr. Kohn: The next item is a wire from Mr. Pinson to the defendant, dated August 20, 1953, marked Plaintiff's Exhibit 7 for identification.

The Court: It is received in evidence.

(Whereupon said document marked PLAINTIFF'S EXHIBIT 7 for identification, was received in evidence.)

Mr. Kohn: The next item is a wire from the defendant to the plaintiff, dated August 20 and marked for identification as Plaintiff's Exhibit 8.

The Court: That is received.

(Whereupon said document marked PLAINTIFF'S EXHIBIT 8 for identification, was received in evidence.)

Mr. Kohn: The next item is a wire from plaintiff to defendant, dated August 24, 1953, and marked Plaintiff's Exhibit 9 for identification.

The Court: It is received in evidence.

(Whereupon said document marked PLAINTIFF'S EXHIBIT 9 for identification, was received in evidence.)

Mr. Kohn: The next item is a wire from defendant

35 to plaintiff, dated August 25, 1953, and marked—

The Court: What was the previous one?

Mr. Kohn: That was August 24.

The Court: Very well.

Mr. Kohn: The next one is dated August 25.

The Court: How is it marked?

Mr. Kohn: It is marked Plaintiff's Exhibit 10 for identification.

The Court: It is received in evidence.

(Whereupon said document marked PLAINTIFF'S EXHIBIT 10 for identification, was received in evidence.)

Mr. Kohn: The next one is from defendant to plaintiff, dated August 28, 1953, and is marked Plaintiff's Exhibit 11 for identification.

The Court: It is received in evidence.

(Whereupon said document marked PLAINTIFF'S EXHIBIT 11 for identification, was received in evidence.)

Mr. Kohn: The next is Plaintiff's Exhibit 12 for identification. It appears to be a letter dated October 3, 1953, from plaintiff to defendant.

The Court: It is received in evidence.

36 (Whereupon said document marked PLAINTIFF'S EXHIBIT 12 for identification, was received in evidence.)

Mr. Kohn: The next one is Plaintiff's Exhibit 13 for identification, a wire from defendant to plaintiff, dated October 6, 1953.

The Court: It is received in evidence.

(Whereupon said document marked PLAINTIFF'S EXHIBIT 13 for identification, was received in evidence.)

Mr. Kohn: The next item is Plaintiff's Exhibit 14, a wire from plaintiff to defendant, dated October 7, 1953.

The Court: It is received in evidence.

(Whereupon said document marked PLAINTIFF'S EXHIBIT 14 for identification, was received in evidence.)

Mr. Kohn: Exhibit No. 15 is an item from defendant to plaintiff, dated October 8, 1953.

The Court: It is received in evidence.

(Whereupon said document marked PLAINTIFF'S EXHIBIT 15 for identification, was received in evidence.)

37 Mr. Kohn: The next is Plaintiff's Exhibit 16, a wire from plaintiff to defendant, dated October 20, 1953.

The Court: It is received in evidence.

(Whereupon said document marked PLAINTIFF'S EXHIBIT 16 for identification, was received in evidence.)

Mr. Kohn: The next is Plaintiff's Exhibit No. 17 for identification, a memorandum consisting of two pages, which will be referred to as a memorandum sent by Mr. Sprecher on behalf of the defendant to myself, as one of the attorneys for plaintiff.

The Court: It may be received.

(Whereupon said document marked PLAINTIFF'S EXHIBIT 17 for identification, was received in evidence.)

Mr. Kohn: That consists of seventeen documents.

38 Mr. Kohn: We will now have Mr. Olson testify as the first witness on behalf of the plaintiff.

ROY OLSON, called as a witness in behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. O'Brien.

Q. Will you state your full name, please?
A. Roy Olson.
The Court: Spell the last name. Is it "o-n;" or "e-n"?
The Witness: "O-n," sir.
The Court: Proceed.

By Mr. O'Brien:

Q. What is your business, Mr. Olson?
A. I am a certified public accountant.
Q. In what State are you a certified public accountant, Mr. Olson?
A. The State of Illinois.
Q. Mr. Olson, how long have you been a certified public accountant in the State of Illinois?
A. Since 1930.

Q. Mr. Olson, would you tell the Court and jury,
39 what education you received prior to becoming a certified public accountant?

A. I am a graduate from the State University of Iowa, in Iowa City, with a degree of bachelor of science and commerce.
Mr. Clayton: If your Honor please, we will stipulate as to Mr. Olson's qualifications.
The Court: Thank you, Mr. Clayton. His qualifications as a certified public accountant are agreed to by the defense.
Mr. O'Brien: Thank you.

By Mr. O'Brien:

Q. Are you a member of a firm of certified public accountants, Mr. Olson?
A. I am a partner in the firm of McCallen, Olson & Abney, 10 South LaSalle Street, Chicago.
Q. Mr. Olson, do you know the defendant in this case?

A. Yes, sir.
Q. Would you state his name, please?
A. Henry Appelbaum.
Q. When did you first meet Mr. Appelbaum?
A. I met Mr. Appelbaum on May 10, 1955.
Q. Would you tell the Court and jury, please, Mr. Olson, the circumstances under which you met Mr. Appelbaum?
A. I visited his office at 120 South LaSalle Street in connection with this trial.
Q. Who sent you, if anyone sent you, to Mr. Applebaum's office?
A. Lou Kohn, attorney for the plaintiff.
Q. Would you tell us, the Court and jury, that is, Mr. Olson, just what Mr. Kohn asked you to do?
A. Mr. Kohn asked me to determine how much was owed the plaintiff by the defendant.
Q. Would you state, please, Mr. Olson, if any documents were supplied you by Mr. Kohn to assist you in your reviews of Mr. Appelbaum's books and records?
A. Mr. Kohn furnished me a copy of the agreement dated October 19, 1950, and also furnished me a statement which he said was given him by the attorney for the defendant which showed an amount owing the plaintiff.
Q. Mr. Olson, I show you Plaintiff's Exhibit 1, a contract dated October 19, 1950, and ask you if this is the contract, a copy of which Mr. Kohn supplied you?
A. Yes, sir.
Q. I show you Plaintiff's Exhibit 3, Mr. Olson, the extension letter of July 22, 1952, and ask you if you were supplied by Mr. Kohn with a copy of that document?
A. Yes, sir. That is the contract.
Q. Mr. Olson, I show you Plaintiff's Exhibit 17, the memorandum sent by Mr. Sprecher, counsel for defendant, to Mr. Kohn, counsel for the plaintiff, and ask you if this is the additional document you said you were supplied with?
A. Yes, sir, that is the document.
Q. Now, Mr. Olson, would you tell the Court and jury, please, if Mr. Kohn gave you any additional or any special instructions?
A. I received no special instructions. I was merely asked to ascertain from the records of the defendant how much was owed the plaintiff.

Q. Did the defendant make his books and records available to you, Mr. Olson?

A. Yes, sir.

Q. Now, where were the books and records that he made available to you located?

A. In the office of Henry Appelbaum, 120 So. LaSalle Street, Chicago.

Q. Would you tell the Court and jury, please, Mr. Olson, just what books and records you did examine or review?

A. I reviewed the general ledger of the company and supporting records: the cash receipts book, the cash
42 disbursement book; the sales register, and the journal, together with supporting invoices, bills, and inventory records.

Q. What period of time was covered by those books and records of Mr. Appelbaum that you reviewed?

A. November 1, 1950, to December 31, 1954.

Q. Mr. Olson, could you give the jury a picture of the number, that is, in quantity, of books and records of Mr. Appelbaum that you reviewed?

A. The cars of shrimp shipped numbered 152. Some of these cards had lot classifications of shrimp of as many as 24, though some of the lots were sold in a single sale—others, possibly, had as many as 20 sales. I would estimate there were well over 5,000 transactions covered in the period.

Q. You reviewed the books and records of Mr. Appelbaum in connection with all these transactions, is that correct?

A. Yes, sir.

Q. Mr. Olson, could you give the ladies and gentlemen of the jury an estimate of the time you spent reviewing these books and records of Mr. Appelbaum?

A. My time records—

43 Mr. Clayton: I object to that, your Honor, as immaterial.

The Court: That objection is sustained. I don't think that is material.

Mr. Kohn: The purpose being, if the Court please, to show the thoroughness of this gentleman.

The Court: I sustained the objection.

And then I might acquaint you with the procedural rule here. Whoever objects is the attorney. There is only one attorney on either side that speaks on any objection.

By Mr. O'Brien:

Q. Mr. Olson, did the books and records of the defendant reviewed by you contain an amount in the general ledger or elsewhere indicating the total balance due plaintiff from defendant?

A. Yes, sir.

Q. Will you tell the Court and jury, please, what was that balance, and where did you find it?

Mr. Clayton: I would object, your Honor, to the statement that the books and records showed a balance due. I think his records would show certain figures, and then
44 it would be for the Court and the jury to determine whether that amount was due.

The Court: Your objection is well taken.

Reframe your question.

By Mr. O'Brien:

Q. Mr. Olson, would you tell the Court and jury, please, whether or not the books and records of defendant reviewed by you contained an amount in the general ledger or elsewhere indicating the total credit in favor of plaintiff from defendant?

A. Yes, they did. There was a general ledger account of accounts payable to Reno.

Q. Would you tell the Court and jury, please, what was this total credit balance?

A. The balance in that account at December 31, 1954, was $183,838.09.

Q. I show you Plaintiff's Exhibit 17, Mr. Olson, that is the memorandum sent by Mr. Sprecher, attorney for the defendant, to Mr. Kohn, attorney for the plaintiff, and ask if you can reconcile it—

I will just hand it to you first, Mr. Olson (handing document to witness).

45 Mr. Olson, will you read from Plaintiff's Exhibit 17, the total credit indicated thereon in favor of plaintiff?

A. $198,153.81.

Q. Now, Mr. Olson,—

The Court: May we have that figure again? $198 what?

The Witness: —153.81.

The Court: Go ahead.

By Mr. O'Brien:

Q. Excuse me, Mr. Olson, what was that?

A. $198,153.81.

Q. Mr. Olson, are you able to reconcile the difference between the total credit balance appearing on Mr. Sprecher's memorandum, Plaintiff's Exhibit No. 17, and the total credit balance you found in Mr. Appelbaum's own general ledger?

A. Yes, sir.

Q. Will you do so, please, for the benefit of the Court and jury?

A. The amount due Reno per statement of defendant, $198,153.81.

Q. Would you repeat again, Mr. Olson, the balance found on the defendant's general ledger, so we know about it?

A. The balance on the defendant's general ledger:

46 $183,838.09.

First I must add to the amount shown on the statement of defendant, $1,000.00, a mathematical error in it.

Q. That is a mathematical error in which particular document?

A. In the statement furnished by the attorney for the defendant.

Next I must deduct net additional commission due on sales from cars 29 and 30 amounting to $315.72, leaving a balance of $198,838.09.

Q. Mr. Olson, before we go any further, will you tell the jury in whose favor, first, that $1,000.00 error was? Was it in favor of plaintiff or in favor of defendant?

A. The $1,000.00 error was in favor of the defendant.

Q. So that brought the amount of the credit balance due up to what figure?

A. $199,153.81.

Q. Now, this other figure you mentioned, was that a credit—or, was that in favor of plaintiff or in favor of defendant?

A. That was in favor of defendant, and it reduced the balance then to $198,838.09.

47 The other reconciling item to the general ledger balance did not relate to this contract. It was for $15,000.00 and was stated to have been made for income tax purposes only.

Q. Now, Mr. Olson, to recapitulate the three figures you have mentioned: namely, the $1,000.00 mathematical

error that was in favor of the plaintiff, the $315.00 in favor of the defendant, and then this bookkeeping entry you found in the general ledger of defendant, making the proper additions and subtractions of these three figures, you do reconcile Plaintiff's Exhibit 17 and the item you found in the defendant's own general ledger, is that correct?

A. Yes, sir.

Q. Now, Mr. Olson, would you tell the Court and jury, please, whether or not you, personally, have made a computation based upon your review of all these books and records and invoices and what have you of the defendant as to the total credit balance in favor of plaintiff?

A. Yes, sir.

Q. Would you tell the Court and jury, please, Mr. Olson, what that credit balance is?

A. The amount is $207,7—

The Court: Two hundred what?

By the Witness:

48 A. (Continuing.) $207,784.39.

Q. Mr. Olson, did you record your computations and the total credit balance due anywhere?

A. Yes, sir. I made a computation.

Q. Do you have the written computation with you?

A. Yes, sir, I do; and, I also have a copy that has been prepared from it.

Mr. O'Brien: Could I have the copy, please?

Let the record show that a copy of the document referred to by Mr. Olson has been supplied counsel for defendant.

The Court: Very well. Proceed.

Mr. O'Brien: I would like to have this document handed to me by Mr. Olson marked Plaintiff's Exhibit 18 for identification.

(Document so marked.)

The Court: Proceed:

By Mr. O'Brien:

Q. Mr. Olson, would you tell the Court and jury, please, whether or not there are any differences between the result of the computations you made based upon your own independent review of the defendant's books, and the

49 result of the computations appearing on Plaintiff's Exhibit 17, the memorandum from Mr. Sprecher to Mr. Kohn?

A. Yes, sir. There are differences.

Q. Now, Mr. Olson, based upon your view of the defendant's books and records, can you reconcile this difference or these differences?

A. Yes, sir, I can.

Q. Now, Mr. Olson, would you do so please, for the Court and jury, treating separately each item and indicating the difference between the Sprecher memorandum, or Exhibit 17, and your own computations?

A. First, the amount shown per Sprecher's statement, $198,153.81. First add the mathematical error in favor of the defendant, $1,000.00, leaving a balance, $199,153.81.

Second, deduct the net additional commission due on sales from cars 29 and 30 in favor of the defendant, $315.72, resulting in a balance of $198,838.09.

Next, I add breading items of $4,816.56, resulting in a balance of $203,654.65.

Next, add storage and handling charge, Reno—

Q. Mr. Olson, would you back up just a minute?

50 You mentioned a breading item. Would you specify what this breading item was, and so the jury will know just what it is described as on the Sprecher memorandum?

A. It is described as, "expenses, breading and cost, $3,205.62, breading, freight, and Customs, $663.16, deveining machine, $149.00, Hamilton Supplies, $798.78—Total, $4,816.56."

51 Q. Now, this appeared as a credit in favor of the defendant on Mr. Sprecher's memorandum, is that correct?

A. That is right.

Q. And you didn't deduct this item on your statement that you prepared, is that correct?

A. No, sir

Q. What was the nevt addition or subtraction?

A. The next is an addition for storage and handling charged Reno in excess of the amount paid $1,136.78, resulting in an amount of $204.791.43.

Q. Mr. Olson, would you back up again just a minute? Would you rephrase this and explain to the jury this last term that you mentioned, just what it was as close to layman's language as a professional accountant?

A. The monthly reports furnished the plaintiff by the defendant included an amount for storage and handling that was based on estimate. The actual amounts paid

were kept a record of in the general ledger account and this amount of $1,136.78 represents the excess of the estimations over what was actually paid.

Q. In other words, Mr. Olson, there were estimates made of charges to be made against Reno which were not ultimately proved correct when the actual money was paid out, is that right?

A. That is correct.

52 Mr. Clayton: I will object to the form of the question, your Honor.

The Court: Sustained. He has fully explained. The question may be stricken.

By Mr. O'Brien:

Q. Would you continue, please, Mr. Olson?

A. Next I add rebates of storage and handling charges $2,992.96 resulting in an amount of $207,784.39, which is the amount I have calculated.

Q. Would you explain again in as close to layman's language as you can, Mr. Olson, what you mean by rebates, storage and handling?

A. The cold storage company made rebates for the two year period ending October 31, 1952 of (12½%) twelve and one-half per cent of the amounts paid. The refunds or rebates are made in four pieces. The first one covered, oh, six or seven months and the next one four or five and the four of them covered just an even two year period. They were twelve and a half (12½%) of the amounts paid.

Q. Mr. Olson, in your review of the defendant's books and records, did you find any additional sums that you have not as yet mentioned that might be added to this sum of $207,784.39?

53 A. Yes, sir.

Q. Now, would you take each such amount that you found separately and tell the Court, and Jury just what they were and where you found them and why you think they might be added?

A. There was one item set out in the account, in the account payable account called Reno truck insurance in the amount of $1,350.00 which did not appear to have been credited to Reno and the records are not clear just whether or not or how much of it might apply to the plaintiff.

There was another item in the amount of $1,743.90, which

was an adjustment of the storage and handling which the records similarly did not fully explain whether or not it or any portion of it should have been credited to the plaintiff.

Q. And what is the total of these additional amounts or are you through, Mr. Olson?

A. I am through.

Q. What is the total of these additional amounts?

A. These additional amounts total $3,093.90.

Q. Mr. Olson, did you in your review of defendant's books and records search for documents or entries in defendant's books to support these charges to Reno?

54 A. Yes and I asked for support for them.

Q. Mr. Olson, bearing in mind this sum of $207 thousand plus dollars that you have found to be a credit in favor of plaintiff as reflected on defendant's own books, have you made a computation reflecting the times when the individual amounts adding up to this total became properly credited to plaintiff on defendant's books?

A. Yes, sir, I have.

Q. Do you have any documents containing results of this computation?

A. Yes, I have.

Q. Did you prepare any such documents, yourself?

A. I prepared such a document and I have had copies prepared of it.

Q. Would you hand me a copy please of any such computation?

A. Yes.

Mr. O'Brien: I would like to have this document handed to me by Mr. Olson, marked as plaintiff's Exhibit 19 for identification. (Said document was marked as requested.)

By Mr. O'Brien:

Q. Now, I hand Plaintiff's Exhibit 19 or identification to you, Mr. Olson, and I would like you to explain
55 what the document contains and just what it is all about for the Jury?

A. This document is a tabulation of the amounts by due date, the amount due and the calculation of interest, and the interest is computed at five per cent (5%) from the date due, to June 6, 1955.

The first amount due, $767.77, became due on May 15, 1951; and the interest on that amount up to December 15, '51, at five per cent (5%), December 15, '51, being the

date that that balance changed and that there was more due, amounted to $22.40. The additional amounts became due on December 15, '51, bringing the amount then due to $1,023.22, and the interest on that amount up to June 15, '52, the next date of change, was $25.58.

Q. Now, Mr. Olson, would you state in a general way what you did month by month when the calculations were made. Then we will get to the results of this document.

A. As the additional amounts became due for reductions they were reflected at the particular date they became due and the interest between dates of these changed and the balance was computed.

Q. Now then, Mr. Olson, would you state whether or not the total amount due as reflected on Plaintiff's
56 Exhibit 19 for identification is the same as the total credit balance indicated on Plaintiff's Exhibit 18 for identification?

A. Yes, sir, it is.

Q. Would you tell the Court and Jury, please, Mr. Olson, whether or not these two total credit balances due plaintiff from defendant included the $3,000 plus dollar item which you think might be added because you could find no support for it on defendant's books?

A. This amount of $207,784.39 does not include the $3,000 and some odd dollars, we're not certain.

Q. Mr. Olson, would you tell the Court and Jury what interest calculations you made, if any, on these various amounts and what the total interest would be on such amounts as they fell due on any date that you might have figured such interest?

Mr. O'Brien: Strike that last question.

By Mr. O'Brien:

Q. Mr. Olson, with interest at the rate of five per cent was due on each one of those credit balances and if such rate of interest was figured from the date the first such item became properly credited until June 6, 1955, what would the amount of any such interest be?

A. As I have computed it, the interest would
57 amount to $17,656.64.

By the Court:

Q. Seventeen, what?

A. $17,656.64.

By Mr. O'Brien:

Q. And have you mentioned the rate of interest that you would make on any such computations at, Mr. Olson?

A. That is computed at the rate of five per cent (5%) and using each month as one-twelfth of a year.

The Court: We will take a recess of ten minutes.

(A recess taken.)

The Court: You may proceed.

Mr. Kohn: If the Court please, on behalf of the plaintiff I would now like to offer into evidence—

The Court: That should have been done by the man who is examining the witness. He has not finished with his witness.

Mr. Kohn: He has finished with the witness.

The Court: Well, we have not had cross-examination.

Mr. Kohn: No, but I want to offer in evidence.

58 The Court: Yes. Let him do it. He has presented them.

Mr. O'Brien: At this time the plaintiff offers into evidence Plaintiff's Exhibit No. 18 for identification and Plaintiff's Exhibit No. 19 for identification.

The Court: Any objection?

(No response.)

The Court: They may be received.

(Said documents so offered and received in evidence were marked PLAINTIFF'S EXHIBITS NOS. 18 and 19.)

The Court: You may cross-examine.

Cross-Examination by Mr. Clayton.

Q. Mr. Olson, you made the audit of the books and records of the defendant as you stated, did you not?

A. Yes, sir, except that it was not a detailed audit.

Q. It was not a detailed audit?

A. No, sir.

Q. Now, with respect to the books and records, did you prior to auditing the books of the defendant see the reports that Reno's auditor had made?

A. No, sir.

59 Q. Were you informed that Reno's auditor had audited the books and records of the defendant prior to the date that you went in to audit?

A. No, sir.

Q. With respect to these particular items—

Mr. Kohn: If the Court please, Mr. Clayton and I wanted to advise you that parties have agreed that Mr. Appelbaum, Junior, Robert Appelbaum, was excluded from the Courtroom and Mr. Collenburg, witnesses for the plaintiff, here now, pursuant to the agreement of parties notwithstanding the earlier motion to exclude.

The Court: You do not care to have them excluded?

Mr. Clayton: No. Not those two.

The Court: Very well.

By Mr. Clayton:

Q. Now, during the course of your audit, did you have occasion to check a document dated March 31, 1953, which is a report to Reno from Penguin, I will ask that it be marked Defendant's Exhibit 1 for identification.

(Said document was marked as requested.)

Mr. Kohn: May we have a copy, Mr. Clayton? Let us look at it just a minute?

60 By the Witness:

A. Yes, sir, this report was made available to me.

By Mr. Clayton:

Q. I would ask and direct your attention specifically to the item that is referred to as "storage per audit to February 28, 1953," and the amount, $1,442.98.

It is right, is it not, that you had occasion to check that item, also?

Mr. Kohn: Mr. Clayton, pardon me. I have great difficulty in hearing you when you turn your back. If you could speak a little louder, please.

Mr. Clayton: Pardon me.

The Court: I think the jury has difficulty with him.

Stand alongside the jury box over there. Bring your papers with you, or stand where you are and shout.

Mr. Clayton: Yes.

By the Witness:

A. (Continuing.) Reno was given credit on the March 31st report for an adjustment of storage in the amount of $1,442.98.

By Mr. Clayton:

61 Q. Now, with regard to this storage item that you have referred to as appearing on the books of the defendant for a certain amount, that was chargeable to

Reno which reflected a smaller amount paid by them to the storage company—you recall that item that you referred to?

Now, you did check the contract that was entered into between the plaintiff and the defendant before you went to audit the books, did you not?

A. Yes, sir.

Q. So you would have a general idea as to the items which were chargeable to Reno and the items which were not chargeable to Reno, is that correct?

And you recall, do you not, as you were auditing the books, that the storage, the icing, and so forth, was to be paid by Reno; that is correct, is it not?

A. Yes, sir.

Q. Now, in the course of your audit and in checking the contents, did you not find, sir, that there was a published rate that was charged for the storage of shrimp by the warehouses?

A. Yes, sir.

Q. Did you not further find as a result of your checking that there was a published rate that was charged for the storage of fish that is different from the rate charged

62 for the storing of shrimp?

A. That may be; I am not aware of that.

Q. And the amount that the storage houses charged for the storing of shrimp and the handling of shrimp is in excess of the rate charged for the storing and handling of fish, isn't that correct?

A. I am not aware of that.

Q. Now, the books that you checked of the defendant, did not the rate which they in fact paid—that is, the defendant—was a rate which the storage houses had published as the charge for the storing and handling of fish, rather than shrimp?

A. The bills supplied by the Chicago Cold Storage Company identified these items as fish generally. There might have been a few cases where they were identified as shrimp.

Q. So the items which were stored, however, were shrimp, isn't that correct?

A. Yes, sir.

Q. And the bills reflected that they were fish; that is, the storage was for fish?

Now, did you have a conversation with Mr. Appelbaum about that—the defendant?

A. No, sir, I did not.

63 Q. Did you have a conversation with any of the persons connected with the defendant concerning that item?

A. Not as to the rate between fish and shrimp.

Q. Did you have a conversation with any person connected with the plaintiff concerning this charge?

A. No, sir, I did not.

Q. Now, so, I take it then that the charge which the books reflected that was being charged to the plaintiff for storage was the rate which the Chicago storage firms charges for the storing and handling of shrimp, rather than fish, isn't that correct?

A. I am not aware of that.

Q. Did you check to see whether or not the charge which the defendant made to Reno, the plaintiff, for the storing of the shrimp was the rate which the Chicago cold storage houses charged for the storing of shrimp?

A. The report contains this statement about the storage charges: "Storage charge is figured by taking the total pounds received during the month of March 132,036 pounds, cars 2222, at one-half cent, plus inventory as of February 28, 1953—15,400 pounds at one-quarter cent; 132,036 by .005, plus 15,400 times .0025 equals $698.68.

"A credit of $1,442.98 is based on over-estimations of storage audit to February 28, 1953."

64 Q. Now, I will ask you again whether or not you did not check and ascertain that the rate which Reno was charged, which accounted for the difference between their books and what you say they had been charged with, was a difference between the rate charged for the storing of shrimp and the rate charged for the storing of fish?

A. The rate charged was an estimation as set out in this report.

Q. I understand that, Mr. Olson, but possibly I don't make myself clear.

Mr. Kohn: If the Court please, I wish you would let the witness finish his answer. You interrupted him when you didn't like it at the first part of it.

Ask the question over again, and let him finish the question you asked.

By Mr. Clayton:

Q. Did not you find, sir, that by checking the books of

the defendant that the charge which you say that the plaintiff is entitled to, the amount of $1,136.78 referred to as storage and handling, which amount you stated should have been credited to the plaintiff, was an amount
65 which represented the difference between what the rate charged for the storing of shrimp and the rate charged for the storing of fish for the particular poundage in question?

A. No, sir. It represented the difference between what had been charged Reno and what had been actually paid to the cold storage company.

Q. Now, I will ask you this.

In your computation, did not you find that what they charged Reno was based upon the rate which was charged for the storing of shrimp, rather than fish?

A. I am not aware of that.

Q. You are not aware of that? All you know is the amount which they charged Reno was $1,136.78 more than what they actually paid the storage house?

A. Yes, sir.

Q. And the bills from the storage house which you checked showed that the item was fish, rather than shrimp?

A. It was described as fish.

Q. You also found, did you not, on the tariff rate, that the rate charged for shrimp is a different rate than that charged for the storing of fish?

A. I did not find that out.

Q. Did you make a check to ascertain?

66 A. I did not check that.

Q. You are not able to state now whether there was a difference or not, are you?

A. I am not.

Q. Now, with respect to the item of $2,992.96 which is referred to as rebates on storage and handling, that was an item which did not appear on the books during the same period that this item that is referred to as storage and handling appeared, did it?

A. In part, it did.

Q. What part did that appear at the same time?

A. I think it was April 28, 1953, there was an amount, rebate received of $1,421.23, of which $1,347.71 applied to Reno.

Q. Referring to the Exhibit 18 which was a computation that you made, sir, I will ask you to look at that and say whether or not you do not show in this docu-

ment that the amount charged Reno in excess of amount paid for the period from February 28, 1953 to February 28, 1954, was $1,136.78? That is the storage item that I have just referred to.

That is correct, isn't it?

A. Yes, sir.

67 Q. And does not this same document reflect that the rebate of 12½ per cent on charges for the two years ended October 31, 1952 was the $2,992.96 item?

A. That refers to the date when the charges were made. That started November, 1950, and ran for two years, and the last month was October, 1952.

Q. Those charges ended at a period before the other item that you have mentioned began, isn't that correct, according to your own exhibit there?

A. Yes, sir, except that the rebate was not received on October 31, 1952.

Q. I am not talking about when it was received. I am referring to the time when the charge was made. Isn't that correct?

A. That is correct.

Q. Did you have a conversation with either Mr. Appelbaum, the defendant, or a son of his concerning the date that the storage and handling charges were terminated?

A. Yes, sir.

Q. They told you, did they not, that it terminated around November, October, as reflected in your report there, did they not?

A. They told me that that rebate terminated as of October 31, 1952.

68 Q. Did not they also tell you that when a Mr. Alcaldi was here and was conferring with Mr. Appelbaum, that he was shown and explained those figures—those various items of rebate?

A. They stated that there was a settlement made as of February 28 on storage and—

Q. Go right ahead, sir.

A. That there was a settlement on storage and handling made on February 28, 1953. I don't recall that they said—

Mr. O'Brien: If your Honor please.

The Court: Finish your answer.

By the Witness:

A. (Continuing.) I don't recall that they mentioned

whether or not these items of rebate had been shown to him.

The Court: Now, what is it you wanted to say?

Mr. O'Brien: Your Honor, there is a reference there to settlement, and Mr. Alcaldi, and I think it is all unconnected and no authority is shown for whom Mr. Alcaldi was there or what he was doing here.

69 And then I think the term "settlement" is highly improper. I move to strike the last answer.

The Court: The motion is denied.

By Mr. Clayton:

Q. With reference to the settlement of the rebates, did not they tell you that that was made after the Reno auditor was here and checked their books?

A. I am not aware that they said there was any settlement on rebates.

Q. They did refer to an item that was paid, did they not — a sum that was paid after the Reno auditor and Mr. Alcaldi was here?

A. They referred to a settlement on storage and handling.

Q. That is right.

A. Yes, sir.

Q. Do you recall now the amount that they told you that they paid Reno?

A. The amount that is shown in this report, $1,442.98.

Q. That is right. Now, with respect to the items that you have referred to that appear—that is, the storage item and the rebates—all appeared on the books and records of the defendant company, did they not?

A. Yes, sir.

70 Q. And the records sho.. all of those?

Now, with respect to the insurance, the truck insurance, what, sir, did I understand you to say with respect to that item totalling $1,350.00?

A. The records indicate an adjustment for truck insurance in the amount of $350.00. Yet, the records do not adequately support just what it covers.

It appears that Reno was charged $275.00 a month for truck insurance, and the truck insurance is subject to adjustment after audit by the insurance companies. Usually the actual amount of their premium does not equal the advance deposit or a flat amount of $275.00 a month or any flat amount.

Q. You cannot now say, though, that this amount that you referred to as being an actual overcharge, can you?

A. The records do not support it either way.

Q. That is right. Now, with respect to the records that you checked and you spoke about interest that would be due on certain sums of money as those amounts became due on certain dates.

Now, in checking the books and records of the defendant, did not you see advances from time to time of sums of money totalling $20,000 and $40,000 which they made over and above the amount that they were to pay
71 to the plaintiff, and for which no interest was charged the plaintiff by the defendant.

A. I am aware that there were some figures, and I did not check whether or not any interest had been paid in connection with them.

Q. But the records did disclose advances that were made from time to time by the defendant to the plaintiff, isn't that correct?

A. Yes, sir, in the early part of the contract.

Q. And you did not check, though, to ascertain whether or not the defendant in fact charged interest on those advances?

A. I did not check the interest on those advances.

Q. With respect to Exhibit 19 in which you made a computation with respect to the amount of interest, now, that computation of interest is based upon the assumption that the amounts which are reflected in this exhibit became due and payable to the plaintiff on the particular dates set forth in this exhibit, isn't that correct?

A. That is correct.

Mr. Clayton: I have no further.

The Court: Is there any redirect?

72 *Redirect Examination by Mr. O'Brien.*

Q. Mr. Olson, this computation as reflected on Plaintiff's Exhibit 18 which I will show you again, these were prepared upon entries you found in your independent review of defendant's books and records, is that correct?

Mr. Clayton: Of course, I object to the words "independent review," your Honor.

The Court: The objection is sustained. He has already testified what he made this form, and that he made it.

By Mr. O'Brien:

Q. Mr. Olson, were there any entries on the defendant's books and records in connection with storage and handling or insurance which indicated they were put there to reflect a final settlement of any differences between the parties?

A. I am not aware of any except the item of that $1,442.98 referred to in the March 31st report, "storage per audit to February 28, 1953."

Q. Mr. Olson, what did you do with that item of
73 $1,442. and some cents?

Mr. Clayton: We would object to that as immaterial, your Honor.

The Court: The objection is overruled. He may answer.

By the Witness:

A. It was taken into the computation and was paid in connection with the amount due for the March, 1953 report.

By Mr. O'Brien:

Q. Where on Plaintiff's Exhibit 18, if at all, does there appear a figure in the computation of which you took into account this $1,442 and some cents?

A. It is taken into account in the balance amount due Reno, March 15, 1954, $207,784.39.

Q. Did you charge plaintiff or did you charge defendant with this amount of $1,442 and some cents in making your computations?

A. The plaintiff has been charged for it.

Q. All right, plaintiff has been charged. Did you subtract it from the sum you found as the total credit in favor of plaintiff or did you add to it?

74 A. It had been settled. It was not one of the open items. Consequently, it does not appear as an item in its computation. It is one of the cleared items.

There were many cars generally that had been cleared up to 2-30-53. This item of $1,442.98 is one of the items that had been cleared. It was made as an additional payment in connection with the March, 1953, report when an amount of $13,532.43 was paid to Reno. Except for this $1,442.98 it would have been that much less.

Q. Mr. Olson, referring to Plaintiff's Exhibit 18 which you have in your possession, are there any items that ap-

pear on that exhibit concerning which you had a conversation with the defendant or one of his representatives?

A. Yes, sir.

Q. Which item did you have such a conversation concerning?

A. I discussed the amount charged Reno in excess of amount paid for storage of $1,136.78.

Q. With whom did you have this discussion?

A. I discussed it principally with Robert Appelbaum, son of Henry Appelbaum and the person who furnished me the records in answering my questions.

75 Q. Robert Appelbaum was in the office of Mr. Henry Appelbaum, is that right?

A. Yes, sir.

Q. Did you say he was the one who furnished you with these documents as you needed them from time to time?

A. Yes, sir.

Q. Now, what did Mr. Robert Appelbaum say to you, and what did you say to him, and when did this take place?

Mr. Clayton: I will object, your Honor, to the conversation that he had with Mr. Robert Appelbaum unless—

The Court: Well, in view of your cross-examination, I must overrule your objection. You went into similar conversation.

By Mr. O'Brien:

Q. Mr. Olson, when did this conversation take place approximately?

A. It happened approximately June 1.

Q. Was this while you were auditing and reviewing the books?

A. Yes, while I was in the office of Henry Appelbaum. The amount charged Reno in excess of amount paid is set out in their general ledger account. They have an account of accounts receivable, Reno's storage—

76 Q. Mr. Olson, the question is what did he say to you and what did you say to him?

Mr. O'Brien: I move to strike that last.

By Mr. O'Brien:

Q. Now, directing your attention to the conversation, will you please state what he said to you and what you said to him, if any?

A. I told Robert Appelbaum that I proposed an adjustment for the storage charged Reno in excess of that amount paid as set out on the general ledger account. I asked him if he thought the accounting as set out in that general ledger account was creditable, and he said he thought so.

He also said that he felt that the adjustment was in order; that it was an accounting that just had not been made.

Q. The adjustment you referred to is precisely what?

A. The amount charged Reno in excess of the amount paid for the period from February 28, 1953 to February 28, 1954, $1,136.78.

Q. Are there any other items that you discussed with either Mr. Henry Appelbaum or Mr. Robert Appelbaum?

A. I discussed a rebate item of $2,992.96.

Q. With whom did you discuss that?

77 A. With both Robert Appelbaum and Henry Appelbaum.

Q. When did this discussion take place?

A. This discussion occurred the same day which I think was June 1, 1955.

Q. Would you tell the Court and Jury, please, Mr. Olson, what they said to you and what you said to them?

A. I informed them that the records did not indicate that any credit had been given Reno for the rebates on the storage.

Mr. Henry Appelbaum did not seem to recall that at that time.

So we produced the remittance devices that supported it, and these were checked in some detail with Robert Appelbaum.

Then Henry Appelbaum stated that with respect to the rebates received before February 28, 1953, that such items had been cleared in the settlement on this audit.

I cannot recall any other specific conversation about it.

Q. Were there any other conversations about any other items?

A. Yes, sir. We discussed the matter of—

78 Q. Excuse me, Mr. Olson. When?

A. On the same day, on or about June 1, 1955. I discussed with Robert Appelbaum the item of truck insurance, $1,350.00.

Q. What did he say to you and what did you say to him?

A. I informed him that I did not find that Reno had been credited with this adjustment. Robert Appelbaum informed me that this adjustment related to transactions not applicable to Reno. In other words, business not under this contract.

The Court: I think this is beyond the scope of cross-examination. This item was not gone into there. I permitted you to examine the conversation as to other items which were gone into on cross-examination. This is not.

Mr. O'Brien: May it please the Court—

The Court: Confine your redirect to what was covered on cross.

Mr. O'Brien: Your Honor, the rebate question went into the dates, as I recall.

The Court: Yes.

Mr. O'Brien: To that extent—

The Court: Guide yourself by my ruling. This last
79 may be stricken. We will have to move along with dispatch. You will take too long with each witness if you re-open subjects on redirect.

By Mr. O'Brien:

Q. Mr. Olson, did you have any conversations with either Mr. Henry Appelbaum or Mr. Robert Appelbaum with respect to the rebate of twelve and one-half per cent (12½%), the item of $2,992.96, that appears on Plaintiff's Exhibit 18?

A. Yes, sir, I did.

Q. When was this?

A. That was on the same date, on or about June 1, 1955.

Q. Would you tell what they said, whatever one of them said, if anything, and what they said to you and what you replied?

A. I explained that I did not find where Reno had been given credit for the amount of this rebate applicable to them. Henry Appelbaum could not recall the rebate item at first and—

Mr. Clayton: At this time, your Honor, I would object. This has been gone into and he has answered. I think now he is repeating the same answer he gave before.

The Court: The objection is sustained.

80 By Mr. O'Brien:

Q. Was there any part of your sum of $2,992.96, Mr.

Olson, that was admitted by either Mr. Henry or Mr. Robert Appelbaum?

Mr. Clayton: I object to that.

The Court: $2,992, what is the $2,992?

Mr. O'Brien: That is the rebate of twelve and one-half per cent.

The Court: The objection is sustained.

Is there any recross examination?

Mr. Clayton: No recross, your Honor.

The Court: That is all. You may step down.

(Witness excused.)

The Court: Call your next witness.

Mr. Kohn: The next witness, if your Honor please, is Mr. Pinson.

The Court: Very well.

PEDRO PINSON, called as a witness in behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

81 *Direct Examination by Mr. Kohn.*

Q. Will you kindly state your full name?

A. Pedro Pinson.

Q. Where do you live, sir?

A. Mazatlan, Mexico.

Q. What is your business?

A. I am the general manager of the company called Reno—Refrigeradora Del Noroeste.

Q. Will you state the nature of the business of Reno, please?

A. Yes, Reno is engaged in the freezing, purchasing, and cold packing of shrimp.

82 Q. And where are those shrimps sold?

A. Well, you mean sold finally? In the United States, most of it.

Q. How long have you been associated with Reno?

A. Well, I have been the general manager since sometime during the middle part of 1949.

Q. What is your position with the company?

A. I am the general manager.

Q. How long have you been?

A. Since that time.

Q. Since 1949?

A. Middle part.

Q. And will you state whether or not you have had any previous business experience in the shrimp industry prior to 1949?

A. I was a director of—

Mr. Clayton: I will object to that as immaterial.

The Court: He may answer as a general proposition.

By the Witness:

A. Well, I was a director of the company previous to that.

By Mr. Kohn:

83 Q. Are you connected presently with any other companies in that business?

A. Yes, I am a director of Exportadores Associados, referred to here as E.A., and Crest Importing Company, Inc.

Q. In what capacity, sir?

A. Director.

Q. Director?

A. Yes.

Q. Are you a member of any trade association?

A. I am a member of the Mexican Fishing Chamber. I was past president of the Shrimp Association of the Americas and I am presently chairman of the Board.

Q. Will you state what that latter organization is?

A. Well, the Shrimp Association of the Americas is an association of the United States shrimp industry and the Mexican shrimp industry.

Q. Will you repeat again the first organization you mentioned, the Mexican Fishing?

A. Yes, the Mexican Fishing Chamber.

Q. What is the nature of that organization, sir?

A. That is an association of the fishing industry within the Republic of Mexico.

Q. Was the shrimp sold by your company all year around?

84 A. No, sir. What we call our season starts approximately around October 1, and ends, well, not at a fixed date but sometime during the latter part of June, sometimes during the middle part of July but not later than say, July 15.

Q. What does your company do with the shrimp it obtains?

A. Well, they are selected, picked by sizes, colors, weight, packed and frozen.

Q. Then, what disposition is made of them?

A. Well, they are sold.

Q. What are your sources of your shrimp supply?

A. Well, we own some boats. We buy shrimp from independent owners and we tall pack for independent boat owners. That is, they deliver the shrimp to us and we freeze it and pack it for them and charge them for it.

Q. Now, is there any particular area from which you obtain shrimp that you sell?

A. Yes, sir. What I would call the West Coast of the Gulf of Cortez or Gulf of California.

Q. Will you explain to the Court and Jury exactly where that area is with reference to, let us say, California?

A. Well, it is where the Colorado River ends starts the Gulf of Cortez. And our place of business is
85 about, I would say, 13 or 14 hundred miles south of San Diego, and about 800 miles south of Nogales. I can't remember the exact distance. Does that answer your question?

Q. Yes.

A. It is on the West Coast. It is on the Pacific.

Q. Could you give us a general idea of the extent of the area in which this source of supply exists?

A. Well, the very end of the Gulf of Cortez to about 150 miles south of Mazatlan, because we do not operate all through that Coast because it would be too far. You may say 250 miles north of Mazatlan and 150 miles south of Mazatlan. That is where our boats, the one that deliver shrimp to us operate.

Q. Has your company sold shrimp to the defendant?

A. Yes, sir.

Q. When did you first have an arrangement with the company for sale of shrimp?

A. October, 1950, I understand.

Q. I show you Plaintiff's Exhibit 1, which is the contract dated October 19, 1950, and ask you if that is the—

A. That is it, sir.

Q. —that is the arrangement that you referred to?

A. Yes, sir.

86 Q. Following the execution of this agreement did you then ship shrimp to the defendant, beginning with the October 19, 1950 season?

A. That is correct, sir.

Q. And that continued on until the end of the season, did it not?

A. Yes, sir.

Q. And then beginning with the next season, when would the next season be?

A. October, 1952.

Q. Did you continue to—

A. No, October, '51. The first season was October, '50 to June or July, '51.

Q. When was the next season?

A. October '51.

Q. That continued until how long?

A. Until June or July, '52.

Q. You continued to sell shrimp to the defendant under this agreement?

A. That is correct.

Q. Contract arrangement?

A. That is correct.

Q. Did this arrangement continue for the next season?

A. That is correct, sir.

87 Q. Which would be October, 1952 to June, 1953, is that right?

A. You mean we continued shipping shrimp?

Q. Yes.

A. That is correct.

Q. Was there any change of any kind in your arrangement with the defendant?

A. Yes, sir.

Q. And is that evidenced by Plaintiff's Exhibit 2?

A. That is correct, sir.

Q. Mr. Pinson, will you examine Plaintiff's Exhibit 3 for a moment?

The Court: What is the date of that?

Mr. Kohn: July 25.

The Witness: July 25, sir?

By the Court:

Q. Of what year?

A. 1952.

The Court: Thank you.

By Mr. Kohn:

Q. You are fluent in both English and Spanish, are you not?

A. I think so.

Q. Can you look at Plaintiff's Exhibit 3 and tell us
88 if you would say substantially accurate translation?

The Court: I understand the defense is making no contention on the translation. We will accept them.

Mr. Kohn: Is that correct?

Mr. Clayton: Yes.

By Mr. Kohn:

Q. Three seasons that you have just referred to, the October, '50, the season beginning October, 1950, the season beginning October, 1951, and the season beginning October, 1952.

Did the Plaintiff sell all the shrimp that it handled during those seasons to the defendant?

A. That is right.

Q. Mr. Pinson, are any of your shrimp during those seasons sold in Mexico?

A. Well, a very small percentage which in the best of cases has never been beyond five per cent of production.

Q. I see.

A. You might say that all of it less whatever small percentages were sold within the Republic of Mexico.

Q. In other words substantially 95 per cent of your output was sold to the defendant?

A. Most certainly.

89 Q. During those seasons?

A. Yes, sir.

Q. Do you know whether or not any of the shrimp sold by your company to the defendant during these three seasons were rejected by the Mexican or American authorities under either the Pure Food Laws or comparable laws in the respective countries?

A. No, sir.

Q. Do you know whether or not during those three seasons the defendant ever claimed that any of the shrimp shipped to him did not comply with those laws?

A. Not that I recall, sir.

Q. During those three seasons did your company receive reports from the defendant that all the shrimp that your company shipped had been resold by him?

A. Well, we received reports of sales but the last ones we did not receive during those three seasons but rather in February of 1954, if I recall it correctly.

Q. But you did eventually receive reports of all the shrimp had been sold by him?

A. Yes.

Q. Has your company been paid in full for the shipments that you have just referred to?

A. No, sir.

90 Mr. Clayton: I object to that.

The Court: Overruled. The answer may stand.

By the Witness:

A. No, sir.

By Mr. Kohn:

Q. Can you tell us upon examining the records whether—

Mr. Kohn: Strike that.

By Mr. Kohn:

Q. Do you recall the particular shipments to the defendant for which you had not remitted to your company in full?

A. Well, I think it is from car 30 to car 38 of the season of '52—'53.

Q. Do you know the approximate amount of the remittances?

A. Well, over $200,000.00 dollars owed to us. The approximate amount or value of them, what?

Q. I am sorry. I did not finish my question.

Mr. Kohn: Would you strike the last question and answer?

By Mr. Kohn:

Q. Will you tell us the approximate amount of the credits to which the plaintiff is entitled on account of

91 these shipments?

A. That is what I throught your question was. So I said over $200,000.00.

Q. Now, Mr. Pinson, I hand you Plaintiff's Exhibit No. 4, which appears to be a Western Union telegram, dated February 25, sent by the plaintiff to the defendant. I will ask you if you sent that particular wire?

A. Yes, sir.

Q. This wire reads:

"By resolution of our board of directors and in accordance with our contract with you, which you signed in October 19th, 1950, that you are hereby notified that it is our will to terminate such contract Stop You will

please take note that said contract in accordance to its clauses will thus end on August 15th, 1953 Stop Awaiting your acknowledgement of receipt of this notice we remain yours truly—"

By Mr. Kohn:

Q. Was that matter discussed with the board of directors of your corporation prior to your sending it?

A. Yes, sir.

Q. I hand you a document marked for identification as Plaintiff's Exhibit 5, which reads as follows, and
92 addressed to your company and sent by the defendant, reading as follows, and dated February 26:

"In reference to your telegram per supplemental agreement signed July 22, 1952, contract is not subject to cancellation until 1954."

Do you recall receiving this?

A. Yes, sir.

Q. When did you next have any communication with Mr. Appelbaum, the defendant, concerning this matter of the contract between your company and Mr. Appelbaum?

A. I personally talked to Mr. Appelbaum. I understand it was in July of that same year, both in Mazatlan and in Mexico City.

Q. After your conversation with Mr. Appelbaum in Mazatlan, did you send him a letter?

A. Yes, sir. I confirmed my conversations by letter which I delivered personally to him.

Q. I have here Plaintiff's Exhibit No. 6, which is dated July 17 on your company's letterhead.

The Court: '53?

Mr. Kohn: 1953.

The Witness: That is right, sir.

By Mr. Kohn:

93 Q. Addressed by you as president and addressed to Mr. Appelbaum reading as follows:

"This will confirm the conversations we have been holding during your visit to this city.

"To begin with, we shall do our best to obtain for your Company, Penguin Frozen Foods, in the territory where you are located, the Representation of the new organization that will handle our production, and that of various other Mexican Plants, from October, 1953 on. You realize, of course, that such decision, on the part of the new organiza-

tion, will have to be based, not only on the final results of your operation with us, but also on the general policy to be decided by its Board of Directors.

"We are to send you, at the earliest possible moment, a detail of the differences found in your accounts by our Mr. Sergio Infante, during his visit to your offices this past February, and if Mr. Infante's figures are correct, you are to credit our account with the sum of said differences.

"Our Board is concerned with the large inventory
94 of unsold shrimp now in Chicago, and in view of the termination of our contract, we would very much appreciate your advice in writing, to the attention of our Board, as to which are your ideas for the sale of said inventory.

"Getting back to the possibility of your handling, in your territory, the products of the new organization to which we now belong, the President of same, Mr. John W. Willis, and the writer, will either contact you, or call on you, to discuss a possible agreement, as soon as a general policy of the new company is decided by its members."

This is the letter you referred to?

A. That is correct.

95 The Court: What is the exhibit number?

Mr. Kohn: It is No. 6.

By Mr. Kohn:

Q. You delivered that letter to Mr. Appelbaum in Mazatlan personally, is that correct?

A. That is correct, sir.

Q. Did you thereafter have any communication with the defendant?

A. A few days afterwards in Mexico City, if I recall correctly.

Q. What was stated in the course of that conversation?

A. Well, we went over again the new organization which we have discussed and if I remember correctly, the parting words of Mr. Appelbaum at the Balmer Hotel on the evening previous to his departure—

Mr. Clayton: I am going to object to this at this time your Honor.

The Court: I can't hear you.

Mr. Clayton: I would object to that at this time. He was asked to relay a conversation that he had with Mr. Appelbaum at this meeting.

The Court: Yes. I assume that is what he is leading up to, except he is giving the foundation which
96 Mr. Kohn should have asked him for at the time he asked for the conversation. That is why it is not objectionable. We will save some time.

By the Court:

Q. State what you said to Mr. Appelbaum and what he said to you on that occasion.

A. That I would be very glad to cooperate in his obtaining this sub-brokerage of Crest Importing Company in the Chicago and vicinity area.

He said he was interested and that he wished us a great deal of luck and that he recalled me that he was a very good businessman that had great experience, and that any time I wished to consult with him he would be happy to do so.

By Mr. Kohn:

Q. Do you remember any other details of that conversation?

A. No, sir. That was the end of it.

Mr. Kohn: If the Court please, may I ask for a glass of water?

The Court: Yes. Bring him some water here.

97 Mr. Kohn: While he is getting that—

By Mr. Kohn:

Q. Mr. Pinson, I show you Plaintiff's Exhibit 7, marked for identification, dated August 20th, a wire from you to the defendant, and ask you if you sent that on or about the date it bears?

A. Yes, sir.

The Court: The exhibit number again?

Mr. Kohn: Exhibit No. 7.

The Court: Thank you.

Mr. Kohn: I would like to have Mr. O'Brien read that to the jury.

The Court: Yes.

Mr. Kohn: While I get a drink of water.

The Court: He may read it.

Mr. O'Brien: This is Plaintiff's Exhibit No. 7 and is addressed to Henry Appelbaum. Actually, it is called Appleby-baum—and it is signed by Pedro L. Pinson, and reads as follows: It is dated August 20, 1953.

98 "Reference todays phone conversations will appreciate your wiring us reasons your not taking bid received through Willis for total inventory thirty-one forty twos specially when you told us you made sale of thirty thousand pounds same size at two cents below Willis bid stop As you stated over phone today that you are stopping all further sales we advise you such attitude your part may considerably damage our already affected interests if market continues decline stop consequently repeat our offer immediate disposal total inventory to Crest Importing Company feel as only way relieving you your actual obligations bank America and terminate amiably our business relations stop under such bases Willis will gladly discuss with you in Chicago shortly possibility your have sub brokerage arrangements with Crest as indi-
99 cated in our letter of July seventeenth."

By Mr. Kohn:

Q. Did you then receive Plaintiff's Exhibit No. 8, being the wire from the defendant to you dated August 20th?

A. Yes, sir.

Mr. Kohn: I will ask Mr. O'Brien to read it and repeat the same process.

Mr. O'Brien: This wire is dated August 20, 1953, addressed to Pedro Pinson, signed by Henry Appelbaum and reads as follows:

"Regarding your telegram received August 20th conclusively proves your intention to wash me out of the picture in violation of your contract notwithstanding my great service and contribution. I am not interested in any piecemeal settlement. I intend to protect our company against your obvious moves to repudiate your obligations, when you are prepared to keep your repeated promises to send authorized representatives to Chicago I am willing to
100 do everything I can to work out an amiable solution."

The Court: We will recess at this time until 2 o'clock this afternoon.

(Whereupon at 12:30 o'clock p. m. a recess was taken until 2:00 o'clock p. m. of the same day, being June 8, 1955.)

101 Before Judge Campbell and a jury.

June 8, 1955,
2:00 o'clock p. m.

Court met pursuant to a recess.

Present:

Mr. Louis A. Kohn, Mr. Cornelius B. Kennedy, and Mr. Patrick O'Brien, appeared on behalf of the plaintiff;

Mr. Robert A. Sprecher, and Mr. Joseph Clayton, appeared on behalf of the defendant.

102 The Clerk: Case on trial.

The Court: Will the witness resume the stand?

Mr. Kohn: Mr. Pinson, will you take the stand?

The Court: You may proceed with the direct examination.

PEDRO PINSON, called as a witness in behalf of the plaintiff, having been previously duly sworn, resumed the stand, was examined and testified further as follows:

Direct Examination (Continued) by Mr. Kohn.

Q. Mr. Pinson, I hand you Plaintiff's Exhibit 9 and ask you if that is the wire that plaintiff sent defendant on August 24 in reply to the last communication from defendant?

A. Yes, sir.

Mr. Kohn: I ask you to read this, Mr. O'Brien.

Mr. O'Brien: Plaintiff's Exhibit No. 9 is a telegram dated August 24, 1953, and it is addressed to Penguin Frozen Foods, 120 So. LaSalle. It is from the plaintiff.

103 (Reading.) "Re tel —"

Re telegram—

"surprise tone you use which considered totally uncalled for stop there is no violation of our contract which was duly and legally cancelled stop we do not wish to start unconstructive polemic stop and in accordance clause thirteen shall appreciate your closing accounts advising us at once of final figures which shall be duly verified by authorized representative so that inventory can immediately be disposed of."

By Mr. Kohn:

Q. Did you then receive the following wire identified as Plaintiff's Exhibit 10 in reply from defendant?

A. Yes, sir.

Mr. Kohn: Will you read that, Mr. O'Brien?

Mr. O'Brien: Plaintiff's Exhibit 10 is a wire dated August 25, 1953, and it is addressed to the plaintiff and it is from the defendant.

104 This wire says:

(Reading.) "Competent counsel have advised us our contract is in full force and effect until August 15, 1954. Again urge that you send authorized representative as you have often promised to do so that we can negotiate amicable settlement."

By Mr. Kohn:

Q. Did you also then receive Plaintiff's Exhibit 11 which I now show you, sir?

The Court: Number what?

Mr. Kohn: 11.

By the Witness:

A. Yes, sir.

Mr. Kohn: I will ask Mr. O'Brien to read this.

Mr. O'Brien: Plaintiff's Exhibit 11 is another wire addressed to plaintiff from defendant. It is dated August 28, 1953. This wire says (Reading):

"I do not intend to continue a pointless exchange
105 of telegrams stop at your request I came and stayed two weeks in Mexico with no results stop I now insist that you keep your commitment to send authorized representatives to Chicago."

Signed, "Henry Appelbaum."

By Mr. Kohn:

Q. Mr. Pinson, thereafter did plaintiff send an authorized representative to Chicago to negotiate with Mr. Appelbaum?

A. Yes, sir.

Q. Who was that representative?

A. Mr. Oscar Fraustro.

The Court: Who?

The Witness: Oscar Fraustro.

The Court: Spell the last name.

The Witness: F-r-a-u-s-t-r-o.

By Mr. Kohn:

Q. He is the gentleman that is standing over there and I am pointing to him?

A. Yes, that is he.

Q. Do you know approximately the date that he went to Chicago, if you remember?

A. I cannot quite remember. It is sometime, I
106 think, in September, sir.

Q. Then do you know how long Mr. Fraustro stayed in Chicago.

A. A few days, sir. Maybe four, five, six days. I do not recall exactly.

Q. Did he then report to the company?

A. Yes, sir.

Q. Did he then also report to you—

A. Yes, sir.

Q. (Continuing.) —concerning the conference in Chicago?

A. Yes, sir.

Q. Following this report and return of Mr. Fraustro to Mexico, were there further communications between the plaintiff and the defendant?

A. Yes, sir.

Q. I hand you what purports to be a letter dated October 3 from plaintiff to Penguin Frozen Foods, marked as Plaintiff's Exhibit 12 and ask you if that letter was sent on or about the date it bears?

A. Yes, sir, it is a confirmation of a wire.

Q. And the wire is correctly stated in that letter?

A. Yes, sir.

107 Mr. Kohn: Mr. O'Brien, will you kindly read this?

Mr. O'Brien: Plaintiff's Exhibit 12 is a letter dated October 3, 1953, to the defendant. It reads as follows.

The Court: To the defendant?

Mr. O'Brien: Yes, sir. It is to Penguin Frozen Foods, the defendant, which is Mr. Appelbaum.

"Dear Sir:

"Herewith enclosed you will find copy of our today's wire which contents are self-explanatory and which reads as follows:

'This is to advise you that Board Directors this Company at meeting held yesterday confirmed extension letter July 1952 stop therefore contract remains in full force and vigor and Directors hereby request payment to Bank

America on or before Wednesday October 7, 1953, of all sums due as result your sales to date our shipments
108 anticipate shipping first car around October 9th this simultaneously payment Bank America open letter credit to cover this first shipment stating market prices all sizes accordance our contract.'

"We thus await the payment as requested and you must fully realize that the retention by you of the funds due us has caused so far grave damage to our company and any further delay could result in our financial failure.

"Yours very truly"

Signed by the plaintiff.

109 Q. Mr. Pinson, did the plaintiff shortly thereafter receive a reply to this communication?

A. Yes, sir.

Q. From the defendant?

A. Yes, sir.

Q. I hand you what purports to be a wire dated October 6, marked Plaintiff's Exhibit 13 and ask you if that is your communication you referred to?

A. Yes, sir.

Mr. Kohn: Mr. O'Brien, will you repeat the usual process?

Mr. O'Brien: Plaintiff's Exhibit 13 is a wire dated October 6, 1953 and it is addressed to the plaintiff and it is signed by Henry Appelbaum which reads as follows:

"Gratifying at long last to have you acknowledge your responsibility under our contract together with statement of your intention to perform. Inasmuch as you specify use of letters credit assume you are returning seven per cent commission arrangement. All this by agreement. However, in light of my recent experiences I am entitled to adequate security for your performance. Puzzled
110 by your direction of only one letter of credit when heretofore you have requested five or more at the opening of season. Nevertheless, letter of credit opened Banco Occidental at the following prices Reno U/10 88¢, U/15 85¢, 16/20 75¢, 21/25 70¢, 26/30 60¢, 31/42 50¢, peeled 60¢ Sunny Brand three cents less per pound and all other brands five cents less per pound.

Henry Appelbaum—Penguin Frozen Foods."

By Mr. Kohn:

Q. Did the plaintiff then reply to defendant as indicated in plaintiff's Exhibit No. 14?

A. Yes, sir.

Mr. Kohn: Would you read this?

Mr. O'Brien: Plaintiff's Exhibit 14 is a wire dated October 7, 1953, and addressed to the defendant, signed by the plaintiff and reads as follows:

"Commercial relations renewed under original contract and extension. Your cable omits confirmation that require payment according to our previous cable has been made and we categorically demand it."

By Mr. Kohn:

Q. Mr. Pinson, did the defendant communicate further with you in response to that last communication from your Company?

A. Yes.

Q. I hand you Plaintiff's Exhibit 15 and ask you if that is the communication you just referred to?

A. Yes, sir.

Mr. Kohn: It reads:

"We will continue to remit for cars—"

The Court: I can't hear you.

Mr. Kohn: (Reading.) "We will continue to remit for cars as completely sold out in accordance with past practice so long as you live up to your agreement."

The Court: What is the date of it?

Mr. Kohn: It is dated—

Mr. O'Brien: October 8.

The Court: '53?

Mr. O'Brien: Yes, sir.

Mr. Kohn: That was No. 15.

By Mr. Kohn:

Q. Did the plaintiff thereupon reply to the last communication from the defendant?

A. Yes, sir.

Q. I hand you plaintiff's Exhibit No. 16 which
112 appears to be a wire dated October 20, 1953 to Penguin Frozen Foods and ask you if that is the communication you referred to?

A. Yes, sir.

Mr. O'Brien: Plaintiff's Exhibit 16 is a wire dated October 20, 1953. It is addressed to the defendant. It is from the plaintiff.

"Your failure to comply with our wire of October 3 and pay over to us or to First National Bank, Chicago, for our

account, the amount you owe for shrimp sold by you, is most serious breach of contract on your part and we refuse to send you any more shrimp for resale by you in the United States. We demand that you promptly deliver First National Bank, Chicago, for our account, all warehouse receipts covering unsold shrimp sent to you by us and we demand that you immediately pay same Bank the balance you now owe that you stated, our attorney, Collenburg, on October 14, as being approximately $140,000.00."

By Mr. Kohn:

Q. Mr. Pinson, what response, if any, did you as plaintiff receive as the result of that communication Mr.
113 O'Brien just read to the Jury?

A. I think none, sir.

By the Court:

Q. I can't hear?

A. I think none.

The Court: None.

By Mr. Kohn:

Q. Do you know whether or not the balance that you therein refer to has been paid to this date?

A. No, sir.

Mr. Kohn: You may cross-examine.

May I have the last question read?

The Court: Yes.

Mr. Kohn: Read the last question and answer.

(The last question and answer read as recorded above.)

By Mr. Kohn:

Q. But there may have been communications that you have not seen, is that correct?

A. That is right. I don't remember at the moment.

Mr. Kohn: That is all.

Mr. Clayton: May I proceed?

The Court: You may proceed, Mr. Clayton.

114 *Cross-Examination by Mr. Clayton.*

Q. Mr. Pinson, I think you said that you are at present general manager of Reno, is that correct?

A. That is correct.

Q. I am wondering, sir, would you tell the Court and the Jury when Reno was approximately first formed?

A. I don't recall the exact date, Mr. Clayton, but I think it was sometime in '46.

Q. And when it was formed your position with Reno was what at that time?

A. At the very beginning, what, sir?

Q. When did you first become a director of Reno?

A. I don't recall the exact date but I think around '47.

Q. And the business that Reno was conducting in 1949, and for some years prior to that time was what?

A. The same thing, sir.

Q. What was that?

A. Packing and freezing of shrimp.

Q. And what percentage of the supply of the shrimp that was obtained from the West Coast of Mexico did Reno obtain in 1949?

A. That would be a little difficult to answer, because I can't remember the exact figures of the total produc-
115 tion of the West Coast of Mexico.

Q. Do you have any idea about the approximate?

A. Yes, I think—I think that year we packed close to three million pounds.

Q. About three million?

A. I think so.

Q. You mean three million of the total production?

A. That is correct. I mean—I say that I don't remember the exact figure. That is six years ago.

Q. Of that approximate three million pounds, how much did Reno obtain?

A. No, no, sir. I am talking about what we did.

Q. That is what you did?

A. Certainly.

Q. Now, at that time, did you have any particular firm that was distributing your shrimp in the United States?

A. Yes, sir.

Q. Who was that?

A. In 1949?

Q. Yes.

A. Stan Schulman & Company.

Q. Were you with Reno in any official capacity at the time that the contract was entered into with the defendant?

A. In 1950, I was the general manager.

116 Q. And had you been a Director prior to that time?

A. Yes, sir.

Q. And in 1949, the latter part of 1949, did you have occasion to come to Chicago?

A. I was already the general manager of the Company in the latter part of '49.

Q. Yes. Now, in June of 1949, did you have occasion to come to Chicago and see Mr. Appelbaum?

A. In June of 1949?

Q. Yes.

Mr. Kohn: If the Court please.

By the Witness:

A. I don't think so.

The Court: Just a moment.

Mr. Kohn: I would like to interpose an objection. I can't see the relevance of anything in 1949. That is just mere background material.

The Court: With this defendant he may answer.

By Mr. Kohn:

Q. Did you have an occasion to come here in June or July of 1950?

A. Yes, sir.

The Court: You mean to see Mr. Appelbaum?

Mr. Clayton: To see Mr. Appelbaum?

117 The Court: Yes. He may answer.

By the Witness:

A. No, not to see Mr. Appelbaum.

By Mr. Clayton:

Q. Well, were you in Chicago in June or July, 1950?

A. I think I was, yes, sir.

Q. While here did you see Mr. Appelbaum?

A. Yes, sir.

Q. Did you see Mr. Appelbaum on that occasion with respect to Reno?

A. I had some conversations with him as to his interest in obtaining our Company.

Q. And during the course of those proceedings you suggested to him that if he would advance $150,000.00 you would see that he got the contract or words to that effect?

Mr. Kohn: Just a moment. I can't see that any preliminary negotiations that were not integrated with the contract are material.

The Court: What is the date of these? 1951?

Mr. Clayton: June or July.

The Court: Objection overruled. What is the date of your Plaintiff's Exhibit 1?

Mr. Kohn: October.

The Court: October of 1950?

118 Mr. Kohn: My point is, if the Court please, whatever the terms of the contract are read in the contract would be a violation of parole evidence Rule.

The Court: Objection overruled.

By Mr. Clayton:

Q. Did you at that time state to Mr. Appelbaum that if he advanced to Reno approximately one hundred or one hundred and fifty thousand dollars that you would see that he got the contract?

Mr. Kohn: The same objection.

The Court: The same ruling.

By the Witness:

A. The certain wording is not correct.

By Mr. Clayton:

Q. Will you tell me?

A. I will tell you what I told him or rather what we discussed.

Q. Will you tell me?

A. I said, if he was interested in the contract, the whole of our production, it would require financing of $150,000.00, yes.

Q. In response to that, of course, Mr. Appelbaum told you that he would not finance that amount of money?

A. No, sir. He told me he was interested in it.

119 Q. Did he advance that amount of money?

A. No, sir. I did not continue the discussions with him.

Q. After you returned to Mexico, Reno was financed through Nacional Financiera, was it not?

A. Yes, sir.

Q. And after Reno had been financed through Nacional Financiera, was it not?

A. Yes, sir.

Q. After Reno had been financed through Nacional Financiera this contract that is in question, dated in October of 1950 was entered into between Reno and Mr. Appelbaum?

A. I don't see the connection. I don't understand your question.

Q. I said it was after Reno had been financed by Financiera Nacional?

A. No, sir. Reno was financed by Nacional Financiera since its very beginning.

Q. This contract was entered into in October of 1950, was it not?

A. That is correct.

Q. Now, after the contract was entered into you proceeded—when I say you, I mean Reno proceeded to
120 supply shrimp to the defendant, did it not?

A. That is true.

Q. According to the terms of that contract Reno was to supply the defendant with the entire amount of its production less approximately 10 per cent, which was to be sold?

A. Less a maximum of 10 per cent.

Q. Less a maximum of 10 per cent which was to be sold to the Republic of Mexico?

A. Yes, for Mexican consumption.

Q. And further provided that if the laws of Mexico required that an amount in excess of 10 per cent the contract would be altered to comply with the Mexican laws, is that correct?

A. That is correct.

Q. It was with that agreement that your Company, Reno and Mr. Appelbaum operated under, until these first telegrams were sent to him stating your intention to cancel the contract?

A. No, sir. We operated until the end the 1952-'53 season.

Q. And did I understand you correctly to state this morning that the season ran from August until October?

A. No, sir. I didn't say August.

121 Q. What about the season?

A. I said October 1.

Q. Until when?

A. Until an indefinite date which is sometimes the latter part of June and sometimes the middle part of July. It never ends on a definite or fixed date.

Q. The contract seasons as mentioned in the contract ran from August until October, did they not?

A. No. They ran from October until August.

Q. From October until August?

A. Yes.

Q. Now—

A. May I explain to you the reason for that?
Q. Well, we will get to that a little later.
Mr. Kohn: Mr. Pinson, will you just answer the questions exactly as he asks them?
The Witness: All right.

By Mr. Clayton:

Q. Now, under this contract with the exception of this maximum of ten per cent which Reno was to ship to Mr. Appelbaum, Mr. Appelbaum in turn was to take all shrimp from you, isn't that correct?
A. Yes, sir.
Q. He wasn't at liberty to go out and enter into contracts for the purchase of shrimp with the other shrimp
122 dealers of the West Coast of Mexico, was he?
A. Or any place.
Q. Any place?
A. No.
Q. And after that agreement had been entered into when the shrimp were shipped to Mr. Appelbaum, the contract provided that the storage and so forth was to be paid by your Company, is that correct?
A. The exact terms of the contracts are there and I certainly can't remember every wording of it.
Q. By way of refreshing your memory—
A. They are part of the exhibit, I understand.
Q. In accordance with the provision which was read, I think it was the provision about 17 or 18, your Company was to pay for the—
A. Would you read it to me, please?
The Court: Well, the contract is in evidence. If you want to read a portion of it, Mr. Clayton, you may do so. I think we are delaying the cross-examination by this.
Mr. Clayton: All right.
The Court: Read any portion you care to to the Jury at any time.

By Mr. Clayton:

123 Q. Now, when the shrimps were shipped originally, there were letters of credit that were sent, is that correct?
A. That is correct.
Q. At that time the agreement provided that the defendant was to remit to you 93 per cent of the sale price that he obtained from the sale of shrimp?
A. That is correct.

Q. Correct?

A. Yes.

Q. That was because he was financing the transaction through a letter of credit. Then when this extension agreement was entered into there was a little change with respect to the provision concerning the financing, is that correct?

A. That is correct.

Q. And according to its terms the defendant was to pay to you 95 per cent of his sales price?

A. That is correct.

Q. Your Company was then financing it or you were obtaining some Bank or finance company to finance it for you?

A Yes.

Q. Now, as that agreement went on and these cars were shipped and the cars were sold, remittances would be 124 made by the defendant to your Company?

A. That is correct.

Q. And—

A. Not to my Company, to the Bank of America.

Q. To the Bank of America for your Company?

A. Yes.

Q. And I take it that you would have auditors from time to time inspect the books and records of the defendant, did you not?

A. We only did it at one time, sir.

Q. One time. You were at liberty to do it?

A. At any time.

Q. At any time?

A. Yes.

Q. Now, when was that you first sent this telegram to—

Mr. Clayton: I will withdraw that.

By Mr. Clayton:

Q. In February of 1953 you sent a wire stating that your Board of Directors desired to cancel your contract?

A. That is correct.

Q. And prior to the sending of that wire to you, and when I say you, the Board of Directors, including yourself, had discussed another method of distribution of 125 shrimp in the United States, had you?

A. Yes, sir.

Q. And your Board of Directors felt that you could

distribute them at a more profitable basis to your Company than that with—

A. Let us say—

Q. —you were getting under the contract?

A. —let us say best suited for our, best suited to our kind of production.

Q. What is that, sir?

A. Best suited to our production and marketing conditions.

Q. You also were concerned about whether or not owing to the contractual arrangement that you had with the defendant, your Company would not have to pay income taxes on sales that were made in the United States?

Mr. Kohn: If the Court please, I can't see the relevance or what their idea about income tax—

The Court: We will stay out of the tax feature. The case is complicated enough without that. Sustained.

By Mr. Clayton:

Q. Now, when you discussed another method of distribution of shrimp into the United States, what did you do about that, if anything?

126 A. Well, we discussed an operation or organization that was being proposed to us by a group of producers in Mexico.

Q. And this organization was known as what?

A. It had no name.

Q. Well, was it subsequently formed?

A. Yes, sir.

Q. And what name was it?

A. It has been called E. A.

Q. And that is Exportadores Associados?

A. Exportadores Associados. It would be translated as Associated Exporters.

Q. Who formed E. A., Exportadores Associados?

A. Who formed it?

Q. I mean who composed it?

A. There were various producers from the West Coast of Mexico.

Q. Approximately what percentage of the shrimp producers of the West Coast of Mexico comprised that association?

A. Let me see. Again we come back to the very difficult figure of what is the production of the West Coast because in fishing it is a little difficult because it varies.

But let us say that the West Coast of Mexico produces perhaps an average of between 25 and 28 million
127 pounds. The aggregate production of the producers that formed E. A., would be between 5 and 6 million. Thus it would be what, 20, 12, 15 per cent.

Q. When you say 5 to 6 million, you mean 5 to 6 million producers?

A. Pounds.

Q. Pounds?

A. I am talking about pounds.

Q. I am asking you the Association was composed of the shrimp producers, how many—

A. No, of various shrimp producers from the West Coast, I would say.

Q. That number?

A. Yes.

Q. The number of shrimp producers?

A. Yes.

Q. That composes this organization?

A. I have just answered that, sir. I said 5 to 6 million pounds they produced.

Q. I am not talking about poundage. I am talking in terms of persons or firms that composed the Association?

A. How many were there?

Q. Yes.

A. Oh, I am sorry. I misunderstood your question.
128 I see. I think there were five, sir.

Q. Five?

A. Yes.

Q. And this group of five, did they have a contract with E. A., whereby they were to supply E. A., with the shrimp?

A. No, sir, not at that moment.

Q. As of 1953, did they have such agreement with E. A.?

A. All of them with the exception of our Company.

Q. All of them. When you refer to "our Company" you mean—

A. Reno.

Q. —Reno?

A. Yes, sir.

Q. So, I am given to understand that in 1953, with the exception of your Company, the other shrimp producers that composed this Association had an agreement or contract whereby they would—

A. What time in 1953?

Q. Well, let us say in July of 1953, whereby they would sell—

A. I don't—I can't remember the exact date. I know we never had a contract. I know the others did. I don't run their business so I don't know what date they had a contract.

129 Q. By the way, do you hold any position with the E. A.?

A. Yes, sir. I said I was a director of it.

Q. You are a director?

A. Yes.

Q. You had been a director since its formation?

A. That is correct.

Q. At the time that you were a director and are a director of E. A., you are also the general manager of Reno?

A. That is correct.

Q. Now then, there was another organization formed known as Crest Importing Company?

A. That is correct.

Q. That is an American Company?

A. That is correct.

Q. And it was formed for the purpose of purchasing or obtaining a supply of shrimp from E. A.?

A. That is correct.

Q. Is that correct?

A. Yes.

Q. And you are a director of Crest?

A. Yes, sir

Q. And have you been a director of Crest since its formation?

A. Yes, sir.

130 Q. Now, so that the Jury and his Honor can understand it, Crest had an agreement with E. A., whereby Crest would receive from E. A., a supply of shrimp?

A. Purchase it.

Q. Purchase from E. A., its supply of shrimp?

A. That is correct.

Q. Now, and Crest was to purchase only E. A.'s shrimp, is that correct?

A. That is correct.

Q. And E. A., going backward, purchased its shrimp from these producers?

A. Various producers.

Q. On the West Coast, with the exception of your organization?

A. No.

Q. They had no contractual relation with them?

A. No. It also purchased mine.

Q. Let me ask you this, sir: Was there ever a time when your organization, Reno, was a part of E. A., or a member of E. A.?

A. Was there ever a time?

Q. Yes.

A. It has always been since its formation as shareholder.

131 Q. In E. A.?

A. In E. A.; yes, sir.

Q. And has there been a time prior to September of 1953 when Reno sold its shrimp to E. A.?

A. Never.

Q. Never sold it?

A. No.

Q. Do you know when Reno has sold its shrimp to E. A.?

A. In October of 1953.

By the Court:

Q. Of what year?

A. '53, sir.

The Court: Thank you.

By Mr. Clayton:

Q. That was what part of October?

A. The latter part of October.

Q. And the season began when?

A. October 1.

Q. And when you say the latter part I take it that you mean sometime—

A. After the 15th.

Q. After the 15th? Now, with respect to this Crest, the contract that it had with E. A., was a contract of the same nature which the defendant had with your or-

132 ganization, that is, Reno, insofar as the contract provided that Crest was to buy solely from E. A., or just was to buy solely from Reno?

Mr. Kohn: If the Court please, I object to the witness answering any questions as to the terms of the contract. The best evidence of that is the contract itself.

The Court: We have the contract, Plaintiff's Exhibit 1. The other contract that he refers to we do not have.

Mr. Kohn: That is correct.

The Court: Do you intend introducing them?

Mr. Kohn: No, sir.

The Court: Then you are overruled. He may answer, if he knows.

By the Witness:

A. The exact terms of the contract between Crest and E. A., I cannot recall at the very moment but the terms of purchase of shrimp owned by E. A., previously purchased by the—

Q. Did I not understand you previously to state the terms, it purchased shrimp only from E. A.?

A. That is correct.

Q. And under the terms of the contract which the 133 defendant had with Reno, he was to purchase shrimp only from Reno, isn't that correct?

A. Wait a minute. Do you mean Mr. Appelbaum's contract?

Q. Yes.

A. Yes, sir. The previous contract, in other words the contract with Penguin Frozen Foods that he had to buy his shrimp from us only.

Q. Now, with respect to the supply of shrimp which Reno was putting out after the formation of Crest and E. A.—

A. Yes.

Q. —if Reno was selling shrimp to the defendant, Penguin Foods?

A. Yes.

Q. Reno then would be selling to a competitor of Crest, would it not?

A. I get it. No, sir. Crest did not start operating until October, 1953.

Q. I did not ask you about that.

A. Yes, you asked me.

Q. About it operating, Mr. Pinson.

A. Yes.

Q. I merely asked you whether or not if Reno was selling its shrimp to the defendant, Penguin Foods—

134 A. Yes, sir.

Q. —after the operation and formation of Crest, Reno then would be selling to a competitor of Crest, would it not?

A. If it had a contract with Crest.

Q. That is what I say.

A. But it did not have and does not have a contract with Crest.

Q. You mean Reno does not have a contract with Crest?

A. No.

Q. I didn't ask you that.

A. Then I don't understand your question.

Q. I will try to make it simple.

If Reno who had no contract with E. A., was selling its supply of shrimp to the defendant, Penguin Frozen Foods—

A. Yes.

Q. —at a time when Crest was operating and purchasing its supply of shrimp from E. A., Reno would be selling to a competitor of Crest, wouldn't it?

Mr. Kohn: If the Court please—

135 Mr. Kohn: If the Court please, that is purely an argumentative question. It has hypotheses in it.

The Witness: I don't understand.

Mr. Kohn: Wait a minute while I state my objection.

The Court: Yes, I think it is. However, I think the witness is able to follow it.

It is argumentative. It is something you can argue to the jury, and it is a conclusion that the jury should form.

By Mr. Clayton:

Q. Now, when Reno sent the first telegram to the defendant, that was after there had been a discussion by the Board of Directors as to the validity of this extension agreement which had been entered into between Reno and Penguin Frozen Foods, is that correct?

A. That is right.

Q. I take it that Reno consulted your attorneys as to whether or not you could breach this contract, isn't that correct?

A. We consulted with our attorneys in Mexico City,

136 yes, sir.

Q. Your attorneys in Mexico City advised you that you could terminate the contract that you had had or that you had with the defendant?

A. That is correct.

Q. After you had been so advised and after the Board of Directors had consulted about it, this telegram which was sent back in February was sent, isn't that correct?

A. Yes, sir.

Q. After that telegram had been sent, subsequent telegrams or communications were sent to the defendant as expressing the desire to terminate the contract?

A. That is right.

Q. Now, during that period of time were you under the impression that the contract between Reno and the defendant was terminated legally?

A. That is correct, sir.

Q. Being under that impression, of course you and the other directors of Crest and the directors of E. A. proceeded to make arrangements for the distribution of shrimp here in the United States?

A. For the sale of shrimp to E. A.

Q. For the sale of shrimp to E. A. and in turn, E. A. for the sale to Crest?

137 A. That is correct.

Q. I take it Crest making arrangements for the distribution here in the United States?

A. That is correct.

Q. Now, that continued up to and until the season of—do you refer to it as the reason of '53-'54?

A. That is right.

Q. October to August of 1954?

A. That is correct.

Q. Now, as the result of being under the impression that the contract was validly terminated—

I withdraw that.

It was the opinion of the persons interested in this new method of distribution that there would be more or less one brand used?

A. That is correct.

Q. What was the name of that brand?

A. Crest.

Q. And prior to October, 1953, to your knowledge, were there any cartons ordered by Crest bearing that brand name?

A. Yes, sir.

Q. Do you have an idea as to the approximate number that were ordered?

138 A. Yes. I think a very large amount, but I don't remember exactly; something like five or six million. I don't know exactly.

Q. Five or six million. That was getting ready for the '53-'54 season?

A. That is correct.

Q. Based upon the assumption that the contract between Reno and the defendant went out, is that correct?

A. That is right, sir.

Q. And of course, Reno at that time had no contract with E. A., did it?

A. No, sir.

Q. To your knowledge at that time Reno had no contract with Crest, did it?

A. No, sir.

Q. Now, with respect to making preparations for the '53-'54 season, do you know anything else that was done by either E. A. or Crest?

A. As to what, sir.

Q. In getting ready for the distribution and the sale of shrimp for the '53-'54 season?

A. Yes, they opened their offices.

Q. Do you recall approximately when the offices of Crest were opened?

139 A. I think they were opened some time in July.

Q. Do you know now, Mr. Pinson, when Crest was formed?

A. No, I don't have the exact figure in my head that I remember.

Q. Do you know now when E. A. was formed?

A. It must have been around the same time. I don't know. I don't remember.

Q. You did appear and give depositions, at which time you were asked when Crest was formed?

A. Yes.

Q. At that time, did you not state that Crest was formed in September or October of 1953?

A. I may have said it. I didn't remember.

You have the deposition there, so you may know.

Q. By way of refreshing your memory, Crest Importing Company was formed May 24,—no, June 25, 1953?

A. It may be, sir.

Q. That was, oh, about four or five months before the '53-'54 season began, isn't that correct?

A. Yes, sir, that is correct.

Q. Did you at any time as an official of E. A. enter into any contract negotiations with any of the shrimp producers of the West Coast of Mexico?

140 A. No, sir.

Q. Did you as an official of Crest—

A. I am not an official of Crest.

Q. Well, did you as a director of Crest—

A. I am not the director. I am a member of the Board of Directors.

Q. I say, did you as a director of Crest at any time have any negotiations with respect to obtaining a contract from E. A. with Crest?

A. No. That is, I don't understand your question very well. What was—

Mr. Kohn: Mr. Pinson.

The Witness: Yes.

Mr. Kohn: If you do not understand a question, that is perfectly proper for you to say you do not understand.

The Witness: Well, then, yes. I do not understand and I ask the gentleman to repeat it to me, because I don't get it.

By Mr. Clayton:

Q. Did you at any time as a director enter into any—

A. As a director of what?

Q. Of Crest.

141 A. Yes.

Q. Enter into any contract negotiations with E. A. for the purchasing of shrimp?

A. I think it automatically implied a knowledge of it, and I am going to tell you why. Crest is owned by E. A.

Q. I would suggest that—

The Court: I think he is trying to answer your question.

Mr. Clayton: All right, sir.

By the Witness:

A. (Continuing) Crest is owned by E. A., and as I am a director of E. A. and a director of Crest, certainly I was aware of the existence of a contract between E. A. and Crest.

Is that what you want to know?

By Mr. Clayton:

Q. Now, with respect to Crest being owned by E. A. E. A., in turn, its stock is owned by whom?

A. The various producers.

Q. When this first telegram was sent to the defendant, you received in response thereto a wire in which he stated that he had a valid contract which ran for another year, another season, didn't he?

142 Mr. Kohn: Just a minute, Mr. Clayton. Would you kindly be more specific. There have been so many communications.

The Witness: I was going to ask that—which telegram are you referring to?

By Mr. Clayton:

Q. I will start off with the first one. The first telegram which was sent to Mr. Appelbaum in February of 1953 in which—

A. Yes, I know which one.

Q. (Continuing) —you stated you were cancelling the contract pursuant to a resolution of the Board.

A. That is right.

Q. You received a reply to that?

A. Yes, sir.

Q. The reply stated that a contract was not subject to cancellation until 1954, isn't that correct?

A. Yes, sir, that is right.

Q. After you had received that communication from him, I take it that you discussed it with various members of the Board, did you not?

A. Yes, sir.

Q. You were not in accord with the contract which was then in existence continuing in full force and effect, 143 were you?

A. I don't understand your question.

Q. You did not want the contract which Mr. Appelbaum had to remain in full force and effect until 1954, did you?

A. I felt as manager of my company that—

Q. Just answer the question.

A. Just wait a minute, I have to explain it like this.

Mr. Kohn: You called for that answer.

By the Witness:

A. (Continuing) I felt that it was the new arrangement which we were contemplating was best suited for our particular production, and our marketing problems.

By Mr. Clayton:

Q. You did not want his contract to remain in full force and effect until 1954?

A. I would prefer the other one, yes.

Q. You had prior to that time had discussions with the Board of Directors concerning this contract and your objection to it, hadn't you?

A. Which contract are you talking about?
Q. The contract which Mr. Appelbaum had with Reno?
A. Yes.
Q. You had, hadn't you?
144 A. I had what, sir?
Q. You had had discussions in Board of Directors' meetings concerning this contract with Mr. Appelbaum, and your objection to that contract?
A. I suppose there might have been some. I cannot remember exactly.
Q. Well, you were the one that urged the Board back at the beginning to terminate this contract and to organize a better way of selling your product than you had, isn't that correct?
A. That is correct, sir.
Q. So, from its inception, you were one of the persons that was objecting to this contract with Mr. Appelbaum?
A. As general manager of my company, yes.
Q. That is what I mean, as an official of the company?
A. As general manager.
Q. You at that time or approximately that same time were instrumental in this organization that was being formed known as E. A.?
A. What time are you talking about now, sir.
Q. That would be in 1953.
A. In 1953?
Q. Yes, sir.
A. What, sir?
145 Q. You were interested at that time in the formation of E. A., this organization we have mentioned that you contemplated?
A. Yes, sir.
Q. Now, with respect to the contract that Mr. Appelbaum had with Reno in 1952 when the cars were sold, I understood you to say remittances would be made to the bank in behalf of your company?
A. You mean the '52 '53 season?
Q. 1953.
A. When we financed the shipments?
Q. No, no.
Yes, when you financed the shipments?
A. Yes.
Q. That is correct?
A. Yes.
Q. After you had sent this first telegram in 1953 and

had received a reply in which Mr. Appelbaum told you that the contract continued in full force and effect until 1954—

The Court: Show him the two documents that you are asking him about.

Mr. Kohn: Also, Mr. Clayton, I would appreciate it
146 if, when you refer to documents, because there are so many, that you would follow the Judge's suggestion in the future. I think it might be easier for us then.

By Mr. Clayton:

Q. I show you Plaintiff's Exhibit 4, that is the first telegram that you sent him?

A. Yes, sir.

Q. In response to that you received Plaintiff's Exhibit 5 in which you were told that the contract was valid and lasted until 1954. Then, subsequent to that time, you saw Mr. Appelbaum, did you not?

A. Yes, sir.

Q. Where was he when you first saw him?

A. In Mazatlan.

Q. Did you see him in Mexico City before you saw him in Mazatlan?

A. No, I don't recall it, but I'm sure I saw him in Mexico City after I saw him in Mazatlan.

Q. By way of refreshing your memory, didn't you say you had a discussion with Mr. Appelbaum in Mexico City before you saw him in Mazatlan?

A. It may be. I don't quite recall it. I know I saw him in Mazatlan and later on in Mexico City again,
147 but I cannot quite remember the first time. It may be.

Q. In this conversation you had with him in Mazatlan, did he not tell you that Mr. Fraustro had talked with him concerning this contract and the cancellation of it, and had suggested that he discuss it with you?

A. I don't remember that, sir.

Q. You don't remember that?

A. I do remember that I fully explained to Mr. Appelbaum the formation of E. A. and Crest. I offered him the sub-brokerage—to try to get for him the sub-brokerage in Chicago and vicinity.

Q. What did he say to you when you stated to him that you would try to get for him the sub-brokerage in Chicago and vicinity?

A. Well, he said that he would have to know under which conditions.

Q. What was that, sir?

A. He would have to know under which conditions; that he was open for discussion of the matter.

Q. By way of refreshing your memory, didn't he tell you that he had a contract that ran until 1954, and at which time he was only interested in your company complying with the terms of that contract?

A. No, sir.

148 Q. Didn't you then make some suggestion as to working out a sub-brokerage arrangement at the termination of the contract in 1954?

A. No, sir. What I told Mr. Appelbaum is in that letter.

Q. After you had this conversation with him when you saw him in Mazatlan you gave him a letter?

A. That is where I had that conversation with him, in Mazatlan. That is where that letter was delivered to him.

Q. You now say you don't recall?

A. I don't remember if I saw him or not. I said that before in Mexico City previous to Mazatlan.

Q. The question is now you say you did not talk to him in Mexico City?

A. I don't remember.

Q. Before you saw him in Mazatlan, that is?

A. I don't remember.

Q. But in Mazatlan you did deliver—

A. Yes.

Q. (Continuing.) —Plaintiff's Exhibit 6 to him, did you not?

A. Yes, sir.

Q. After delivering Plaintiff's Exhibit 6 to him, 149 did he have any conversation with you concerning that?

A. I have just said what he said to me.

Q. Oh, the conversation you just related is what he—

A. What took place in Mexico City, and which was confirmed by this letter.

Q. After he had seen this letter, is that correct?

A. Yes, sir.

No, previous to my delivering that letter. That letter I delivered after our conversations as a confirmation of same.

Q. Then I ask you again, Mr. Pinson, what, if anything,

did Mr. Appelbaum say to you after you delivered to him Plaintiff's Exhibit 6 in Mazatlan?

A. I saw him in Mexico City.

Q. Did he say anything to you in Mazatlan when you gave him this letter?

A. I don't remember, sir, frankly.

Q. You don't recall?

A. No, because that was just before he left.

Q. To your knowledge, did he read the letter before leaving?

A. Yes, sir.

Q. You don't now remember whether he said anything?

A. No, exactly the form or the phrases, or what
150 was said, no. Everything had been said before. This was only a confirmation of very lengthy conversations.

Q. During that conversation, didn't he—

A. By the way, shouldn't I return this?

Q. During that conversation, didn't he express to you the idea that he was surprised at your company attempting to cancel a valid contract and to wash him out, as he termed it, out of the market?

A. Not to me he did not say that.

Q. You are positive he did not say that to you?

A. Yes.

Q. Now, after you had had this interview with him in Mazatlan, when—when I say when, I mean approximately how long after that was it before you saw him in Mexico City?

A. I think it must have been a few days, because I remember—

The Witness: Is he listening to me?

By Mr. Clayton:

Q. What was that?

A. I say I remember that it was in connection, or at the same time there was a meeting, the annual meeting of the Shrimp Association of the Americas that took place in Mexico City. And, the last time I saw Mr. Appel-
151 baum was at a cocktail party at the Bamer Hotel.

Q. Was anything said at that time about your attempting to breach the contract?

A. Should I repeat what I told Mr. Kohn, I said.

Q. I am asking you was anything said at that time about your attempting to breach the contract?

A. No, sir, not to me.

Q. Not to you?

A. No.

Q. You were not present when he was discussing this attempted breach with any other official of Reno, were you?

A. No, sir.

Q. All right now. The next communication that was received was when?

A. There were very many.

Q. Was it in Mexico City in this conversation that you claim Mr. Appelbaum stated that he would be interested in a sub brokerage arrangement?

A. Well, he would be happy to lend me his business experience for the better development of E. A. and Crest.

Q. He told you that, even though he was still insisting that his contract had a year to run and that he did not want to have it cancelled?

152 A. Never discussed that matter with me emphatically as you put it, sir.

Q. The telegram that you had received was explicit, was it not?

A. Yes, sir.

Q. And it definitely stated that the contract did not terminate until 1954, is that correct?

A. You are asking me about a telegram in February, or the conversations in July?

Q. I am now asking you whether or not in view of the telegram which he sent to you in February stating specifically that that contract was valid and existed until 1954, that he then said in July that he would be interested in a sub-brokerage arrangement?

A. Which I offered to him, because I told him we felt that our cancellation was legal.

Q. Well, he at all times told you that it was not legal so far as he was concerned, didn't he?

A. I don't seem to recall his having entered into such a reply with such emphasis.

Q. Did he at any time tell you he thought it was legal?

A. I don't think so. I doubt in July.

Q. At any time did he tell you that?

A. Yes, with that wire.

153 Q. With what wire, sir?

A. Well, the wire that you just read—the reply to me on my wire of February.

Isn't that where he says that his counsel advised him, or something?

Q. Exhibit 5, is this the document that you are referring to, sir?

A. Yes.

Q. Now, you say that he in this document stated that he thought that you could legally cancel the contract?

A. No, I don't say that.

Q. My question was, did he at any time tell you—

A. I say, "Yes," except in that telegram. In July he did not tell me anything.

Q. I don't understand what you mean.

My question was, Mr. Pinson, whether Mr. Appelbaum at any time told you that he thought that you could legally cancel the contract?

A. No.

Q. He at no time told you that?

A. No, sir.

Q. In view of his at all times stating that the contract was in force and effect, you now testify and tell this jury that he said that he would be interested in a 154 sub-brokerage arrangement?

A. Yes, sir.

Q. By the way, didn't he in discussing with you the reasons why he would not stand for his contract to be cancelled, tell you that he had commitments with a number of customers, and he felt that his business reputation impelled him to see that he carried out his agreements with them and supply them with shrimp?

A. I don't think he would have told me that, sir.

Q. You don't think he would have? I am asking you in the course of conversation—

A. No, sir.

Q. (Continuing.) —didn't he so state that?

A. No, not to me.

Q. Were you present when he had a conversation with Mr. Fraustro?

A. No, sir.

Q. Were you present when he had a conversation with Mr. Alcaldi?

A. No.

Q. Up to that time, Mr. Appelbaum was the sole distributor of Rozo shrimp both in the United States and the Dominion of Canada, is that correct?

A. That is correct.

155 Q. According to the organization which you had set up, Crest was to be the sole distributor, is that correct?

A. No, sir.

The Court: We will now take a recess of ten minutes at this time.

(Whereupon there was a ten minute recess.)

156 The Court: Have the witness resume the stand. You may proceed with the cross-examination. Is it all right to hold that?

Mr. Clayton: Yes.

By Mr. Clayton:

Q. I show you this chart. We will mark it a little later.

The Court: Yes.

By Mr. Clayton:

Q. This is representing the shrimp producers on the west coast. This would about directly show the structural set-up with relationship which the merchants bear to this association here, their members. They are members of this association, are they not?

A. Well, I can't very well see from here.

The Court: Incidentally, so the record will be clear, what you are referring to, is this marked?

Mr. Clayton: Defendant's Exhibit 2.

The Court: Let it be marked for identification.

(Said chart was marked Defendant's Exhibit 2 for identification.)

157 By Mr. Clayton:

Q. Were these merchants members of the E. A., this association here?

A. Yes.

Q. The association here, you say, owned Crest Importing Company?

A. Yes.

Q. That is correct, is it not?

A. Yes.

Q. That is about the structural set-up of it?

A. I want to correct one thing. You said at the beginning—

Q. What is that?

A. —that your trades—that these were producers on the west coast of Mexico. They are part of the producers on the west coast of Mexico.

Q. They are part of the shrimp producers on the west coast of Mexico?

A. Of the producers.

Q. And the part that formed these are the part that formed this association?

A. That is correct.

Now, if I may make some corrections, this name is wrong. It does not have a "s" at the end. I do not
158 know who this is. I never heard of him. I do not recognize the name.

Q. You do not recognize the name?

A. No. And another thing—

Mr. Kohn: Just a moment, Mr. Pinson. Would you for the record, you have got to be specific and mention names, instead of saying "this". Identify it.

The Witness: I am sorry. This name, Foresto Horedo is the name of a boat owner.

The Court: Spell it for the Reporter.

The Witness: The way it is spelled here, F-o-r-e-s-t-o H-o-r-e-d-o.

By Mr. Clayton:

Q. You say you do not recognize that name?

A. No, sir.

Q. Now, Mr. Pinson—

A. I don't think there is such a person. I have never heard of such a name.

Q. When you were answering the questions on depositions, you recall that, do you not, when you were questioned?

A. Yes.

Q. And I will ask you, was this question asked of
159 you and was this answer given, reading from page 129 of the deposition—

Mr. Kohn: Mr. Clayton, I think that was a misspelled name. "H" is pronounced like "J".

Would it be someone whose name began with "J"?

The Witness: No, there is a Hernando DeCima and Ernesto DeCima, myself, Hector Feweira, so I think that might have been—

By Mr. Clayton:

Q. I will ask you this: You say you do not recognize any person by that name?

A. No, I don't think the person exists.

Q. When you were answering questions, when you were answering questions put to you when you were giving your deposition, do you recall this question asked you and this answer given. I will give you one question and one answer to refresh your recollection.

A. Yes.

Q. (Reading.) "Q. You are a director?

"A. Yes.

"Q. So there are four directors?

"A. No. Mr. Foresto Horedo—"

Q. Which is the spelling of the name there?

160 A. Yes.

Q. Is also a director. Now, does that name—

A. No, I think the Court Reporter misunderstood me and didn't get the name. Those are the positions—these are the ones I have seen. Most every time there are names that are misspelled of the Spanish names.

Q. To whom were you referring when you answered that question?

A. My recollection, the directors are Hernando De Cima and Ernesto De Cima, his son, also Mr. Fraustro.

Q. That is right.

A. Mr. Fraustro, his first name is Oscar. He is not a director, but is a commissary of the company.

Q. Commissary?

A. Yes.

Q. Who were the other directors?

A. Arturo De Cima, I see there. And the others, that I can't recall, sir.

Q. So instead of the name Foresto Horedo—

A. Yes?

Q. What did you say it should be?

A. Arturo De Cima. Same as that.

Q. So, with the correction of the name from Foresto Horedo to Arturo De Cima, that would appear to be—

161 A. And the Q here and the S here.

Q. The S being omitted?

A. Yes.

Q. When he says "u" for the purpose of the recor he is referring to the word Fraustro, is spelled on the chart F-r-a-n-s-t-r-o, and it should be F-r-a-u-s-t-r-o.

A. Yes.

Mr. Kohn: It is still a beautiful chart.

By Mr. Clayton:

Q. When he refers to an omission of the letter "s" on the Avendano it should be A-v-e-n-d-a-n-o.

A. Yes.

Q. And this Crest Importing Company, the president of it, is a Mr. John W. Willis, is that correct?

A. That is correct.

Q. That is the company that has been referred to as having been incorporated in June of 1953?

A. I have no way of proving it. If you know, you know.

Q. Yes. Now, after you had seen Mr. Appelbaum in Mexico City subsequent to the time that you gave him the letter that has been mentioned, did you at any time see him?

A. Well, there is one point that might be of interest.

Q. Just answer the question.

162 Mr. Kohn: Answer.

By the Witness:

A. I don't recall. I don't recall.

By Mr. Clayton:

Q. Now—

A. I don't think so.

Q. Were you present in Chicago when Mr. Cullenburg and representatives from Reno came?

A. No, sir.

Q. With respect to the subsequent communication that you had with the Defendant, you did receive subsequent to that time on August 20, Plaintiff's Exhibit 7, did you not?

A. Yes, sir.

Q. And in response to that telegram you received Plaintiff's Exhibit 8 dated August 20?

A. Yes, sir.

Q. And in this document he told you that it was obvious to him that it was your intention to wash him out of the picture, notwithstanding the services he had rendered to your company as a distributor, did he not?

A. That is what the telegram says.

Q. He also told you that he intended to protect his

company against the obvious moves in your company
163 to repudiate your obligation?

A. That is what the telegram says.

Q. Up to that time, I mean, prior to the exchange of these telegrams, the method of business has been as you had stated, under this extension agreement, sending to the bank on behalf of your company the money when the cars were sold, is that correct?

A. Yes, sir.

Q. Now, you subsequently sent to him Plaintiff's Exhibit 9, sent on August 24, and you insisted that that document that you had, cancelled the contract legally?

A. That is right.

Q. In response to that telegram of August 27, he told you, did he not, that he considered his contract in full force and effect?

A. Yes, sir.

Q. He told you that based upon the advice that had been given him by competent counsel, he based that opinion, did he not?

A. Yes, sir.

Q. And he also at that time urged that your company send some representatives to Illinois so that they could discuss an amicable adjustment of this thing?

A. Yes, sir.

164 Q. After those exchanges of messages he sent one on August 28, Plaintiff's Exhibit 11, in which he told you, did he not, that—when I say you, I am still referring to your company—that he in substance did not see any need of this needless exchange of wires; to send an authorized representative so that the matter could be adjusted?

A. Yes, sir.

Q. Did he not?

A. Yes, sir.

Q. After you had received that wire I think you sent Plaintiff's Exhibit—well, Plaintiff's Exhibit 12, in which you stated that the Board of Directors had decided to keep the contract in full force and effect, did you not?

A. Yes, sir, but previous of this a representative of our company came to Chicago.

Q. But subsequently—you were not present at that meeting, were you?

A. No.

Q. Now, after this representative had been to Chicago

and had returned, your company sent the Defendant Plaintiff's Exhibit 12?

A. That is correct.

Q. And by this document you stated, "This is to
165 advise you that the Board of Directors of this company, at a meeting held yesterday, confirmed an extension letter to July 19, 1952."

Is that correct? You are then referring to the extension letter that extended the original contract, is that correct?

A. That is correct.

Q. Now, it was your intention to convey to him that you were going to reinstate that extension agreement, is that correct?

A. That it was still valid.

Q. You intended to convey to him the idea that now your company had decided that the extension agreement was valid, is that correct?

A. Yes.

Q. Now, prior to that time you had your Board of Directors, and your attorney had advised you that it was terminated?

A. That it was valid; that our cancellation was valid.

Q. That your cancellation was valid, but that the contract then was no longer in force and effect?

A. Yes, after the cancellation had been sent.

Q. Did you at any time meet with Mr. Appelbaum and discuss into another contract before you sent this
166 telegram, Plaintiff's Exhibit 12?

Mr. Kohn: Just a minute. I do not get that. Would you repeat it?

By Mr. Clayton:

Q. Did you at any time meet with and discuss with Mr. Appelbaum entering into a new contract before you sent Plaintiff's Exhibit 12? After you cancelled?

A. You mean in October?

Q. No, sir; did you, prior to October 3?

A. I don't think I saw Mr. Appelbaum since July.

Q. At the time the Board of Directors had their meeting referred to yesterday, would be October 2, that Board of Directors meeting was held where, in Mazatlan, Mexico?

A. In Mexico City.

Q. In Mexico City. Was Mr. Appelbaum at the Board of Directors' meeting?

A. No. Mr. Appelbaum was not a director.

Q. In other words, at the meeting of the Board of Directors they just decided that since we cancelled it and thought the contract was cancelled, they had to make certain preparations for distributing shrimp, and our American attorneys told us that we couldn't cancel it. So we
167 will say now that we are going to be bound by it?

A. I don't think it was set like that. We will say that we will continue. It was decided unanimously by the Board of Directors to go on with the contract for the one year; that it still had to go on.

Q. Now, before the Board of Directors decided to go on with it, did they communicate with Mr. Appelbaum to see whether or not he would be willing to continue under the same terms that he had been operating on before you attempted to cancel it?

A. Our authorized representative that came to Chicago, you should ask me what the Board of Directors, you are asking me what the Board of Directors said.

Q. I am asking you, did you—

A. Did I?

Q. Yes.

A. I personally?

Q. Yes.

A. You mean not as the company, but myself personally.

Q. Yes. Did you as a member of the Board of Directors?

A. Yes. You mean, see Mr. Appelbaum?

Q. Yes.

A. No, I didn't. I don't think I did.

Q. I will put it this way to you. Did you, as a
168 member of the Board of Directors at any time before—

A. I was not a member of the Board of Directors.

Q. As a general manager of the company?

A. Yes.

Q. —communicate with Mr. Appelbaum and inquire of him whether or not, since these differences had arisen, he would agree to continue?

A. I don't think so.

Q. Under the same terms?

A. I don't think so.

Q. Under the terms that you had been operating on, under the extension agreement, your company, Reno, had not required letters of credit to be sent when a car was shipped?

A. That is correct.
Q. Is that correct?
A. Yes.
Q. Now, in this telegram, Plaintiff's Exhibit 12, you told him that you would be bound by the agreement. "We are going to send you a carload of shrimp for you to arrange for letters of credit."
A. Yes.
Q. That is true?
A. Yes.
169 Q. The extension agreement did not provide for the letters of credit, did it?
A. That is right.
Q. The letters of credit was in the original agreement that was superseded by the extension that was entered into in '52, wasn't it?
A. That is right.
Q. Now, the old agreement, you had letters of credit, didn't you?
A. Yes.
Q. And when he was furnishing letters of credit, because he was financing the shipment, he was then receiving 7 per cent, wasn't he?
A. Yes, sir.
Q. Now, in this agreement, in this telegram here, did you state that you were going to pay him 7 per cent instead of 5?
A. Which telegram?
Q. Plaintiff's Exhibit 12.
A. Which one, sir? Oh, we just said that we would go on with the contract as established on—the first contract of July or October, 1950.
Q. October, 1950?
A. Yes.
170 Q. October 1950 contract wasn't the one that you had attempted to cancel, was it?
A. It does not say here which one. I mean, the contract we had with him. The July 22 extension, sir, was an extension of the October, 1950 contract.
Q. So that we might be clear and not confuse the jury, I will again ask you, Mr. Pinson, whether or not under the original contract that was entered into in 1950, October 19—
A. Yes, sir?
Q. —among other things that were provided, that let-

ters of credit was to be furnished by Mr. Appelbaum in the shipments made?

A. Yes.

Q. And Mr. Appelbaum was to pay to Reno 93 per cent of the sales price. Which meant he got 7 per cent. That was because he was financing it, isn't that correct?

A. Yes, sir.

Q. Now, that contract was extended in July of 1952, isn't that correct?

A. Yes, sir. That is correct.

Q. The extension agreement provided that the terms would be the same, with certain exceptions?

A. Yes, sir.

171 Q. One of the exceptions was that Mr. Appelbaum would pay to your company 95 per cent of the selling price which he obtained for the shrimp, that is, he would receive five per cent, is that correct?

A. That is right.

Q. And the reason for that was that your company was financing the shipment?

A. That is right.

Q. Is that correct?

A. Yes, sir.

Q. And that was the contract that you attempted to cancel, is that correct?

A. Yes, sir.

Q. Now, when you sent this telegram, Plaintiff's Exhibit 12, and you asked that he furnish letters of credit,—

A. Yes, sir?

Q. —the contract which you had attempted to cancel contained no provisions with respect to letters of credit—

Mr. Kohn: If the Court please—

The Witness: Allow me, allow me.

Mr. Kohn: Mr. Pinson—

Mr. Pinson: I will answer him.

172 Mr. Kohn: I will let you answer him. I want to ask the Court before he answers—

The Court: You want me to settle the conflict between you and your client?

Mr. Kohn: No, I want to make a statement. I suggest before Mr. Pinson answers the question, he has asked about the terms of the contract—

The Court: You are having no trouble with me.

Mr. Kohn: No.

The Court: You want him—

Mr. Kohn: Yes. That livens things up a little bit. Before he answers the question, I think it is only fair to the witness that he have a copy of the contract in front of him, the extension agreement.

The Witness: That is what I was asking for.

The Court: He may have it. Now answer the question.

By the Witness:

A. This extension gave us the privilege of not financing our shipments, which would imply then that Frozen Foods would have to do it and in that case the commission
173 would go to 93 per cent. Thus, it is the same company. Your Honor, may I read that as my reply?

The Court: You seem to be doing pretty well. But he is hired to do the reading and you'd better let him do it. He wants to read it.

174 By Mr. Clayton:

Q. Now, Mr.—

A. You have not allowed me to reply yet.

Q. I will give you plenty of time.

The Court: Just answer the questions, now.

Mr. Clayton: Just be quiet.

The Court: If Mr. Kohn will share his time at the end of his case for argument, I will let you argue to the jury. But, now you have to answer questions.

The Witness: All right, sir.

By Mr. Clayton:

Q. Now, after Plaintiff's Exhibit 12 had been sent by your company to the defendant, you then received Plaintiff's Exhibit 13, did you not?

A. May I first ask you something?

You don't want the reply to your question.

Q. Just answer my question, will you please?

A. Anything you—

Mr. Kohn: Don't argue with Mr. Clayton. Just answer his questions.

By Mr. Clayton:

175 Q. After that telegram which had been sent in which you stated that you were renewing the contract, you then received Plaintiff's Exhibit 13, did you not?

A. Yes, sir.

Q. Now, in Plaintiff's Exhibit 13, the defendant told

you and your company that he was gratified to know that you have acknowledged your responsibility under the contract, but inasmuch as you specify the use of letters of credits, that he assumed that you were returning to the seven per cent commission arrangement, isn't that correct?

A. That is correct.

Q. He then also stated that he was puzzled by your direction of only one letter of credit, when heretofore you had requested five or more at the opening of the season. He told you that, didn't he?

A. Yes, sure.

Q. Now, you were familiar with the practice as to the number of cars that would be shipped, and the number of letters of credit that would be requested at the opening of each season when they were operating under the original contract, weren't you?

A. Yes, sir.

Q. When they were operating under the original
176 contract before the extension and you were using letters of credit, and you would usually request about three, five or more, would you not?

A. And sometimes one.

Q. But the greater portion of the time it was more than one, wasn't it?

A. At times, depending upon the production.

Q. I say at the beginning of the season?

A. Yes, I suppose so.

Q. And then, of course, after you had failed to cancel the contract and told him that you would live up to the terms of it, you were only sending him now one car load and requesting one letter of credit, according to this telegram here, isn't that correct?

A. Could I see the telegram—the contract?

Q. I am saying, according to the telegram?

A. Yes, according to the telegram.

Q. After that telegram had been received by you, you sent Plaintiff's Exhibit 14, is that correct?

A. Yes, sir. This is my reply to that.

Q. In reply to that telegram, you merely state that:

"Commercial relations renewed under original contract and extension, your cable omits confirmation that re-
177 quired payment according to our previous cable has been made. We categorically deny it."

A. Yes, sir.

Q. In other words, you told him that in his telegram

to you he made no mention of your request that certain payments be sent?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. He, of course, had inquired in that telegram, had he not, whether or not—since you refer to his sending you letters of credit—you were going back to the seven per cent arrangement?

A. I say by this wire I replied to him.

Q. Just a minute. That was the purport of his inquiry, wasn't it?

A. Certainly.

Q. Did you at any time say anything in here about whether you were returning to the seven per cent or whether you were returning or still going to give him—

A. (Reading) "Commercial relations renewed under original contract—"

Q. Under the original contract?

178 A. Under the original contract, see?

Q. Will you continue to read it?

A. Yes.

(Reading.) "Commercial relations renewed under original contract and extension."

Q. That is right.

A. Yes.

Q. You did not in reply to his inquiry state whether you are going back on the seven per cent commission or whether you were just requesting the letters of credit and still going to give him five per cent, is that correct? You did not mention it one way or the other, did you?

A. I replied—

Mr. Kohn: If the Court please, I object to any further questioning. The documents speak for themselves.

The Court: I think he is calling for a reasonable explanation by the witness. He is entitled to get it.

You may answer.

The Witness: All right, sir.

By the Witness:

A. It was our belief and we were convinced by the
179 text of the extension that it was our privilege to use the 93 per cent with letters of credit, or the 95 per cent by our financing.

If I may, I would like to read clause C of the extension. That is my reply.

By Mr. Clayton:

Q. Did you, in response to his inquiry, tell him that you were going back to the seven per cent?

A. I said very clearly that I was going back to the original contract and its extension, and those documents speak. They are here.

Q. At the time that the extension was attempted to be cancelled, you were not operating on a seven per cent commission, were you?

A. At that moment, no. We were financing it, but it was our option to do it.

Q. You were not operating under the seven per cent commission when you attempted to cancel the contract?

A. No, we were financing our own shipments at that moment.

Q. After that telegram had been sent—

Mr. Kohn: Will you specify which telegram?

180 Mr. Clayton: That is Plaintiff's Exhibit 14 that I have just shown him.

The Witness: That is correct.

By Mr. Clayton:

Q. You received a response to Plaintiff's Exhibit 14, the telegram which you have just read, this document, did you not, sir?

The Court: How was it marked?

Mr. Clayton: Plaintiff's Exhibit 15.

By the Witness:

A. Yes.

By Mr. Clayton:

Q. It, addressed to your Company states: (Reading.) "We will continue to remit for cars as completely sold out in accordance with past practices so long as you live up to your agreement."

A. Yes.

Q. That had been his practice up to and until the time that you attempted to cancel that contract of remitting for the cars when they were completely sold out, wasn't it?

A. I want to know what "practice" is. I don't understand your word "practice".

Does it mean all the time we have done it?

181 Q. I will put it this way. At the time you attempted to cancel your agreement, the defendant had been re-

mitting to you for the cars as they were completely sold out?

A. Not on every occasion since the beginning of the contract.

Q. I am not talking about since the beginning. I am talking about since that extension.

A. It may be so, but I don't remember exactly.

Q. And up to the time he remitted for the cars when they were completely sold out, except on occasions when you would request an advance?

A. Yes, sir.

Q. And he would send it to you?

A. Yes.

Q. Is that correct? And when he would send that advance to you, did he charge you any interest on the advance?

A. I don't remember. It would have to be checked on the sales reports.

Q. So far as you know, no interest was charged?

A. I don't think so.

Q. That is right.

Now, Mr. Witness, in this same Plaintiff's Exhibit 13, the telegram which you received from the defendant in which he stated that since you are asking for letters 182 of credit, he assumed that you were returning to the 7 per cent agreement, he further stated, did he not: (Reading.) "All this quite agreeable. However, in light of my recent experiences, I am entitled to adequate security for your performance."

He told you that, didn't he?

A. Yes.

Q. Did you—I say "you" and I mean your Company—at any time ask of him what security he wanted to secure your performance of this contract which you have attempted to cancel and found out that you couldn't?

A. No.

Q. By the way, you did not have—by "you" I mean Refrigeradora Del Noroeste—did not have any Representative here in the United States upon whom service could be had if he wanted to sue them for a breach of contract, did you?

Mr. Kohn: If the Court please, I object to that question. That calls for a conclusion of law.

The Court: The objection is sustained.

By Mr. Clayton:

Q. Well, did Refrigeradora Del Noroeste have an
183 office in the United States at that time?

A. No, sir.

Q. What is that, sir?

A. No, sir.

Q. And after having received it, did you tell him that: "We will make arrangements whereby you will be secured. You will be given security for our performance."

A. No, sir.

Q. Did you offer to post a performance bond?

A. No, sir.

Q. You did in response to that, on October 20 send to him Plaintiff's Exhibit 16, didn't you?

A. Yes, sir.

Q. In this you stated:

"That your failure to comply with our wire of October 3—"

That is the one that you had sent, and he had sent Plaintiff's Exhibit 13, that I have just read?

A. I don't remember the number.

Q. (Continuing):

"And pay over to us or to First National Bank for our account the amount you owe for shrimp sold by you
184 is most serious breach of contract on your part and we refuse to send you any more shrimp for resale to you in U. S. A."

A. Yes, sir.

Q. You said that. So, as of that date you sent him no more shrimp?

A. That is correct.

Q. You had not prior to that date offer to post a performance bond or give him anything whereby he would—

Mr. Kohn: If the Court please, I object. He has asked that question at least 3 times.

Mr. Clayton: I withdraw it.

The Court: If you will wait until he finishes the question before objecting, I can rule on it.

Mr. Clayton: I withdrew it.

The Court: All right.

By Mr. Clayton:

Q. After that telegram, I understood you to say that you received no further communication from the defendant?

A. That I remember.

Mr. Clayton: Will you kindly mark this defendant's Exhibit 3 for identification?

(Document so marked.)

By Mr. Clayton:

Q. I show you, Mr. Pinson, defendant's Exhibit 3
185 for identification which purports to be a copy of a telegram dated October 21, 1953, addressed to Refrigeradora Del Noroeste, S.A., and from Henry Appelbaum, Penguin Frozen Foods, and ask you to look at that and state whether or not you recall having received the original of that copy?

A. Yes, I think so. Frankly, I don't remember it.

Q. So, after the October 20 wire, you did receive a communication from the defendant—

A. Yes, I remember that. That is right.

Mr. Clayton: Will you excuse us just a moment, Judge.

The Court: Yes.

By Mr. Clayton:

Q. Mr. Pinson, did I understand you correctly to say that Reno owned some stock in E.A.?

A. Yes.

Q. Approximately what percentage of E.A. stock did Reno own?

A. Between 8 and 9 percent, I think it is.

Q. When you sent this telegram to the defendant on October 3, 1953, were you at that time still a director of E.A.?

A. Yes, sir.

Q. Were you at that time still a director of Crest?
186 A. Yes, sir.

Q. Were you at that time still general manager of Reno?

A. Yes, that is correct.

Q. On October 3, when the telegram was sent to the defendant, had Reno given up its stock or disposed of its stock it held in E.A.?

A. Certainly not. It had not sold it.

Q. They still possessed it as of that date, is that correct?

A. Certainly, yes.

Q. Still did, Mr. Pinson?

A. Yes, sir.

Q. In August or September of 1953 as general manager of Reno was there any Reno labels ordered?

A. Reno labels ordered?

Q. Yes, sir.

A. Labels?

Q. Or cartons?

A. Oh, cartons?

Q. Yes.

A. In September of 1953?

Q. Yes.

A. No, sir.

Q. That was, no cartons had been ordered for 187 Crest—the Crest label?

A. No, sir.

Q. You had ordered some of Crest, had you not?

A. No, sir.

Q. Did I not understand you to say that a large number of Crest labels had been ordered?

A. By E.A.

Q. Well, by E.A.?

A. Well, you asked me if it was me.

Q. E.A., did not order any Reno labels, did it?

A. No, sir.

Q. In the formation of this organization, E.A., Reno was a member of that Association, wasn't it?

A. Yes, sir.

Q. With respect to the contract that was originally prepared, wasn't it prepared in the Mexican language?

A. Which contract, sir?

Q. The contract between E.A., and the producers of shrimp.

A. You mean the contract that E.A., has with some of the producers?

Q. Yes, sir.

A. Yes, sir.

Q. In the contract that was prepared in the Mexican language, among the producers of shrimp, wasn't 188 Reno included?

A. No, sir.

Q. You are positive of that?

A. Positive.

Q. Did you at any time see a communication from Mr. Willis, who was the President of Crest, addressed to an attorney, I think it was Mr. Donnelley—addressed to E.A., and to the attention of Mr. Guillermo Lepcowitz?

A. Lepcowitz?
Q. Lepcowitz.
A. I don't know. I would have to see which one you are referring to.
Q. I mean, did you at any time see the communication from Mr. Willis to E.A., addressed to the attention of Mr. Lepcowitz dated March 2, 1954?
A. March 2, 1954?
Yes, sir. I think I saw it.
Q. In that letter, there was enclosed a copy of an agreement that had been entered into for the sale of shrimps between E.A., and Crest Importing Corporation, wasn't there?
A. Yes, sir.
Q. That agreement was sent for the purpose of having it approved, or words to that effect, was it not?
189 A. Yes, sir.
Q. It referred to an agreement that had been entered into in the Mexican language—
A. Yes, sir.
Q. (Continuing): —in which this agreement contained more or less the substance of what had been agreed upon?
A. It was a project, yes, sir.
Q. And that agreement that was entered into in the Mexican language did you at any time see it?
A. I don't think I saw it until it was completely polished up. I don't know which one that is.
Q. You say you don't think you saw the agreement that was in the—
A. The drafts I did not see. I don't think so.
Q. So, you cannot state whether or not Reno was named in there as one of the contracting parties?
A. In the drafts, yes, it is possible that it was.
Q. I am not talking about drafts. In the completed agreement that was in the Mexican language?
A. In the signed contract?
Q. Let me put it this way. Can you now state whether it was in any agreement that was in the Mexican language?
A. That was ever signed? No.
Q. Not whether it was signed or not.
190 A. Well, it may have been in drafts. I cannot consider something not signed in a draft.
Q. But the signed agreement did not contain Reno as a contracting party?

A. That is correct.

Q. Would there be any reason for including the name of Reno in preparing the draft, if Reno was not to be a contracting party?

A. At that time you are talking—

Mr. Kohn: If the Court please, I have to object to that question.

The Court: The objection is sustained.

Mr. Kohn: It is argumentative and assumes certain things that are untrue.

The Court: I have sustained the objection.

By Mr. Clayton:

Q. Prior to your being a director of E. A., you met with Mr. Willis on many occasions to discuss the formation of that organization, did you not?

A. Yes, sir.

Q. Approximately how many times?

A. Oh, I could not remember.

Q. Over what period of time? Could you tell us approximately when these meetings began?

A. Oh, I would presume sometime in 1952.

191 Q. Would you say about the middle of the year or—

A. No, I would think a little earlier than that.

Q. A little earlier?

A. Yes.

Q. Near the 1st of 1952?

A. Yes, sir, I think so.

Q. Did you have any meetings with Mr. Willis concerning the formation of Crest?

A. I had some conversations with him at various times during that period yes.

Q. When you say "during that period", do you mean the period beginning back the first part of 1952?

A. That is right sir.

Mr. Kohn: If the Court please, I don't want to unduly restrict Mr. Clayton.

Mr. Clayton: That is all.

Mr. Kohn: I think he has covered this whole field of this exploration regarding the formation of this project. The witness has been examined thoroughly.

The Court: I think it is sufficient.

Mr. Clayton: No further cross examination.

The Court: Is there any redirect?

Mr. Kohn: I have three questions.

192 The Court: I was going to say that in view of the lengthy direct examination and the lengthy cross examination, I feel that this witness's testimony has been fully exhausted. Accordingly, I am restricting both redirect and recross examination so that it is not to exceed 10 minutes each, so that we will finish with this witness this afternoon.

It is so ordered. Govern yourselves accordingly.

Mr. Kohn: I will be through in less than 10, I believe.

The Court: Very well.

Redirect Examination by Mr. Kohn.

Q. Mr. Pinson, you were asked earlier when the first shipment was made by Reno during 1953-1954 season, which began I believe you said in October?

A. Yes, sir.

Q. Will you give us the exact date?

A. Yes, sir. I now have that exact date.

Q. Would you state to the Court and the Jury what that is?

193 A. October 20, 1953.

Q. I hand you a letter marked for identification Plaintiff's Exhibit 20.

Mr. Kohn: I do not have a copy, Mr. Clayton.

By Mr. Kohn: (Continuing):

Q. —which appears to be a letter sent to you by Mr. Appelbaum on the stationery of the Hotel Bamer, Mexico City, I believe that is called—

A. That is correct.

Q. It is dated July 22, 1953, and I ask you if you received this letter at or about the time of your conference with the defendant in Mexico City?

A. Yes, sir. I received this letter in Mexico City. If I remember correctly, it was delivered personally by Mr. Appelbaum at the Hotel Bamer just before he left.

Mr. Kohn: Would you look at this, Mr. Clayton? I want to offer it in evidence. See if that is Mr. Appelbaum's signature?

The Court: Proceed.

Mr. Kohn: I have not gotten the letter.

The Court: Return it.

Mr. Kohn: I want to apologize to Mr. O'Brien,
194 because I now have to ask him to read one more letter to the jury.

The Court: Well, it has not been offered yet.

Mr. Kohn: I know, but I want to apologize in advance. I now offer it in evidence.

The Court: It is received in evidence.

(Whereupon said document was marked as PLAINTIFF'S EXHIBIT for identification, was received in evidence.)

The Court: Finish your redirect examination before, so that I can see if you have any of the 10 minutes left for reading.

Mr. Kohn: I have one question I would like to ask, but I want to read the letter.

The Court: Finish your redirect examination before you read exhibits.

Mr. Kohn: All right, sir.

The Court: Sit down, Mr. O'Brien.

By Mr. Kohn:

Q. When you stated that the contract was terminated, will you explain what effect that had on future shipments to the defendant for the 1952-1953 season?

195 A. I don't understand your question, sir.

Mr. Kohn: Would you read the question back, please?

(Question read.)

By the Witness:

A. None.

By Mr. Kohn:

Q. You continued to make shipments?

A. That is right.

Mr. Kohn: Now, I would like to—

The Court: Have you finished your redirect examination?

Mr. Kohn: Yes.

The Court: You may read the letter.

Mr. O'Brien: This is a letter dated July 22, 1953 to Senor Pedro L. Pinson.

"Dear Pedro:

"In reply to your request of my opinion on what to do with the small shrimp in the present inventory. I refer you to our letter of July 17, 1953, in which we show the—

inventory and sales of the week ending on same date together with Bob's comments regarding present market.

196 "As of now this information is all I have. —Having been away from my office for ten days.

"At present the amount of small shrimp produced is very great and the market is very sloppy.

"While I prefer to wait until I return to Chicago to study the situation more thoroughly, my opinion at the present time would be, we can not lose much by holding, and may have much to gain.

"The situation in the shrimp industry changes daily, as you know and we should take advantage of bright spots in the market.

"I trust this information will be of assistance to you.

"Do not hesitate to call on me for further information or discussion.

Respectfully,
Henry Appelbaum,
Penguin Frozen Foods."

The Court: Is there any recross examination?

Mr. Clayton: There is no recross, your Honor.

197 The Court: You may step down.

(Witness excused.)

The Court: We will start with your next witness tomorrow morning.

The Jury is excused at this time, and counsel will remain. The Jury is excused until 10 o'clock tomorrow morning.

Your next will be your final witness? I prefer to start out a witness in the morning.

Mr. Kohn: The next witness is Mr. Fraustro, and we have an interpreter.

The Court: You said you would have three witnesses. This is the third?

Mr. Kohn: That is right.

The Court: It is better to start with him in the morning.

Mr. Kohn: Yes, it is.

(Whereupon the following proceedings were had in open court out of the presence and hearing of the Jury:)

The Court: Mr. Clayton, I have been handed by Mr. Willis through my Clerk a document in duplicate which I have reviewed together with a letter to Mr. Willis from Mr. Hecht dated June 7, which seems to me to fully

198 comply with this subpoena duces tecum, which I issued on Mr. Willis in open Court yesterday.

Accordingly, I delivered that document to you at this time in duplicate and if you do not introduce it in evidence, file it with the Clerk at the end of the evidence in this case.

Mr. Clayton: Yes, sir.

The Court: Do you estimate the next witness will take about how long?

As far as I am concerned, the subpoena duces tecum on Mr. Willis has now been complied with. I am holding this if it becomes important.

Mr. Kohn: The next witness will have to be through an interpreter. We have no way of knowing. That might drag it out somewhat. I will say, we will finish in the morning with direct, cross, and redirect.

The Court: Then you will be ready to go ahead with the defense as soon as they finish?

Mr. Sprecher: Yes.

The Court: We will now recess until tomorrow morning at 10:00 o'clock.

(Whereupon an adjournment was taken in the above-entitled cause until Thursday morning June 9, 1955 at 10 o'clock in the morning.)

199 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—53-C-2482) * *

Transcript of proceedings had at the hearing before the Honorable William J. Campbell, one of the Judges of said Court, in his courtroom, United States Court House, Chicago, Illinois, on Thursday, June 9, 1955, at 10:00 o'clock a.m.

Present:

Mr. Louis A. Kohn, Mr. Cornelius B. Kennedy, Mr. Patrick O'Brien, appeared on behalf of plaintiff;
Mr. Robert A. Sprecher and Mr. Joseph Clayton, appeared on behalf of the defendant.

200 Mr. Kohn: Before the Jury comes in I want on behalf of Mr. Willis to state there is one item came in after he was in Court, the minutes.

The Court: Oh, you want to surrender those?

Mr. Kohn: That is right. I want to surrender the minutes, Mr. Sprecher.

Mr. Sprecher: All right.

The Court: Say it again about Mr. Sprecher.

Mr. Kohn: I want to surrender the minutes on behalf of Mr. Willis.

The Court: Yes. That is also pursuant to the subpoena duces tecum.

Mr. Kohn: Yes.

The Court: Now, the subpoena—

Mr. Kohn: Another question of Mr. Willis. He would like to get his file back.

The Court: His correspondence or employment file?

Mr. Kohn: In this case as soon as it has served its purpose.

The Court: As soon as the case is over. I do not know how much, if any, they intend to introduce.

Mr. Kohn: One other—

The Court: After that is done, you see that he gets back what has been delivered to you and the part six which I am holding here we will deliver.

201 Mr. Kohn: This is off the record.

(Discussion had off the record.)

The Court: Deliver these now to defendant's counsel. I think everything calls for the subpoena duces tecum that I had issued had been delivered. Is that correct?

Mr. Clayton: Yes, your Honor.

Mr. Sprecher: While we are here, your Honor, we had one discovery. Your Honor, we had in our discovery processes, we had denied a part of our motion for discovery of some documents from the plaintiff.

The Court: Yes.

Mr. Sprecher: And I think in order to protect my rights on that point that I should probably serve him with a subpoena duces tecum, also, but I don't want to do it if your Honor feels it is useless.

The Court: I do. I have already ruled on that.

Mr. Sprecher: Yes. Then that will be sufficient.

Mr. Kohn: I doubt if it is an appealable order.

The Court: They may want to use it for grounds of appeal in the event the verdict is unsatisfactory. You can do that on the present state of the record. It is unnecessary to serve him with a notice.

Where is Mr. Clayton?

The Clerk: He has gone down to Judge Knoch.

The Court: Anything else we can dispose of in his absence?

202 How long will your witness take, do you think?

Mr. Kohn: Last night I told you I thought that

cross-examination and the redirect and the direct would be finished this morning.

The Court: Yes.

Mr. Kohn: It would be quicker.

The Court: Then the defendant will put on Mr. Appelbaum for a few minutes and then you will put on Willis?

Mr. Sprecher: Yes.

Mr. Kohn: We have a little problem here of language. We will have to get an interpreter.

The Court: I will take a few minutes recess until Mr. Clayton arrives. Recess for ten minutes.

(The following proceedings were had in the Courtroom in the presence and hearing of the jury.)

The Court: The plaintiff may proceed.

Mr. Kohn: Mr. Fraustro; you may step over here and while he is walking over, if the Court please, with the permission of the defendant, I have asked that the exhibit, the original document represented by plaintiff's Exhibit No. 20 be withdrawn and a copy substituted.

The Court: Very well. There is no objection to that, I take it.

Mr. Clayton: No, sir.

The Court: Very well, leave granted.

203 Let the interpreter interpret the oath to him.

Mr. Kohn: Yes.

The Court: Swear the interpreter.

(And thereupon Armando Almonte, the interpreter, was sworn to interpret from English to Spanish, and Spanish to English the questions asked and replies made thereto.)

The Court: The interpreter will tell the witness what the oath was.

Mr. Almonte: Yes, sir.

The Court: Get a chair. Take that chair over and put alongside of the witness.

Mr. Kohn: Would you state your name for the record, Mr. Almonte?

Mr. Almonte: Armando Almonte.

The Court: Where do you live, Mr. Almonte?

Mr. Almonte: I live at 1143 S. Ashland.

Mr. Kohn: What is your occupation?

Mr. Almonte: I am a Spanish radio announcer.

Mr. Kohn: Mr. Almonte, it would help considerably if you spoke louder so that the jury and Court can hear you, and so we may all hear you.

OSCAR FRAUSTRO MARTINEZ, called as a witness on behalf of the plaintiff herein, being first duly sworn, was examined and testified as follows:

204 *Direct Examination by Mr. Kohn.*

Q. Did the witness indicate to you that he understood the meaning of the oath?

Mr. Almonte: Yes, I explained it to him.

Mr. Kohn: Mr. Clayton, as I understood you are willing to waive the qualifications of the interpreter?

Mr. Clayton: Yes, sir.

Mr. Kohn: Is that correct?

Mr. Clayton: Yes, sir.

Mr. Kohn: All right, Mr. Almonte. Would you sit right there. That may work out all right.

By Mr. Kohn:

Q. My first question to Mr. Fraustro is, ask him to state his full name.

The Court: Let us have it. Speak up. Can't you talk loud?

A. The name is Oscar Fraustro.

Q. What is the last name?

A. Martinez.

By Mr. Kohn:

Q. Mr. Fraustro, you are commonly referred to, at
205 least in this case as Fraustro, your last name, is that correct?

A. Yes.

Q. F-r-a-u-s-t-r-o?

A. Yes.

206 Q. Mr. Fraustro, what connection do you have with the plaintiff, Reno?

A. As chairman of the administration.

Mr. Kohn: Mr. Almonte, do not talk to me. Address your remarks to the Court and Jury.

The Court: Let the interpreter stand here and lean against this stand up here. Talk loud enough so the last person in the rear of the Jury can hear you.

By the Witness:

(Through the Interpreter.)

A. He is chairman of the administration council of the Reno plant.

By Mr. Kohn:

Q. Is that comparable to being chairman of the board of directors in an American Company, if you know?

A. Yes, it is.

Q. Do you hold any other position with the plaintiff?

A. No.

Q. Are you connected with any other corporation?

A. For the National Financing.

Q. That is the Nacional Financiera? Is that correct?

A. Correct.

207 Q. Will you tell the Court and Jury, and, Mr. Interpreter, address your remarks not to me. Will you tell the Court and Jury, Mr. Fraustro, what Nacional Financiera is?

The Court: What is his position with National?

By the Witness:

A. He is the general comptroller of the Nacional Financiera.

By Mr. Kohn:

Q. Will you explain to us just what that position involves?

A. He is the fourth executive of the company.

Q. Fourth executive?

A. Yes.

Q. But just what do you do in that position as the fourth executive?

A. He takes care of the income and expenses of the company with the president of the company. He takes care of all of the produce of income and expenses of the company.

Q. Mr. Fraustro, are you familiar in a general way with the nature of the operations of the RFC as it used to be in the United States during the war years, the Reconstruction Finance Corporation?

208 A. Yes.

Q. Does the Nacional Financiera and the RFC, that is the abbreviation, do Nacional Financiera and RFC as it formerly operated, have comparable functions?

A. Yes.

Q. Will you tell us more specifically what the functions of the Nacional Financiera are?

A. The Nacional Financiera operates as an agent of

the Mexican Government to cooperate with the industry of Mexico.

Q. Does that cooperation include the financing of various industrial and other types of business corporations?

A. That is the specific function of Nacional Financiera.

Q. Are you a salaried official of Nacional Financiera?

A. Yes.

Q. Do you receive any compensation from the plaintiff?

A. Only when there is a session of council he receives $100 for a meeting, or 100 pesos, rather, Mexican pesos.

209 Q. When you say session of the Council, I take it you mean meeting of the Board of Directors?

A. Yes.

Q. May be the jury would be interested in how much 100 of Mexican pesos are today in American dollars?

A. Eight dollars.

Q. Mr. Fraustro, do you own any stock in the Plaintiff Reno Corporation?

A. No.

The Court: Of what corporation?

Mr. Kohn: The plaintiff.

The Court: The plaintiff.

By Mr. Kohn:

Q. He owns no stock?

A. No.

Q. That is right. That is, you, personally, Mr. Fraustro, you own no stock personally?

A. No.

Q. Does Nacional Financiera own any stock in the plaintiff?

A. Yes.

Q. Do you have an idea what the percentage of total stock of Reno is owned by N. F.?

A. There is approximately 75% of the total capital.

210 Q. Is N. F., a creditor of the plaintiff?

In other words, does the plaintiff owe N. F., money?

A. The Nacional Financiera has given him an important credit.

The Court: The jury has to hear you. Speak so that the jury can hear you.

By the Witness: (Through the interpreter.)

A. Nacional Financiera, N. F., has given big credits to Reno Company.

By Mr. Kohn:

Q. How long has it been a substantial creditor of Reno, if you know?

A. As long as he remembers, it is since 1947 or '48.

Q. How long has it been a substantial stockholder of Reno?

A. 1948, since 1948.

Q. Mr. Fraustro, calling your attention to the month of September, 1953, did you have a conversation in Chicago with the defendant, Henry Appelbaum?

A. He came to Chicago to speak to him.

Q. Will you tell us how you happened to come to Chicago at that time?

A. Mr. Appelbaum was required to have him come
211 over here as a representative.

The Court: I can't hear you. Stand back of here again.

By the Witness: (Through the interpreter.)

A. Mr. Appelbaum required him to come here to have some talks to him.

The Court: You speak loud.

By Mr. Kohn:

Q. Was that in accordance with the plaintiff's Exhibit No. 10 and 11, representing wires from the defendant to plaintiff dated August 25 and August 28, respectively, which I now show you?

The Court: Speak so the interpreter could hear you.

The Interpreter: What was with reference to that?

By Mr. Kohn:

Q. Mr. Fraustro, would you tell us to the best of your recollection exactly when you first saw Mr. Fraustro on the occasion of this—

The Court: First saw whom?

By Mr. Kohn:

Q. Mr. Appelbaum, on the occasion of your meeting with him in Chicago in September, 1953?

212 A. He arrived in Chicago September 18, 1953.

Q. Did you see Mr. Appelbaum?

A. And he went to the office of Mr. Appelbaum.

Q. And you saw him on that day then in his office, is that correct?

A. He saw him in his office that day.

Q. Do you recall who was present there?

A. Mr. Appelbaum, his son.

Q. Did you at that time discuss the relationship between Reno and the defendant?

A. They started talking about difference between Reno Company and Mr. Appelbaum.

Q. Will you tell us, to the best of your recollection, what you said to Mr. Appelbaum and what he said to you concerning those matters?

A. Why, first he asked him, he has retained the funds of the Company and he answered, he say he did that to kind of press the Company, Reno, to send a representative to talk to him.

Q. I do not believe I have that clear.

A. To retain the funds of the Company, to force the Company Reno to send the representative here to talk to him.

Q. Well, Mr. Fraustro, when you mean funds of the 213 Company, will you explain what you mean by the funds of the Company?

A. Their funds. What he means by the funds is the product of the sale of the four cars—eight freight cars of Cameron or shrimp that he had already sold to him, which had not been paid.

Mr. Kohn: If the Court please, I would like to ask the interpreter to give us the exact words here. When you say "he" I presume you mean "I". Is that correct? The witness said "I".

By the Witness:

A. No.

Mr. Almonte: That is Mr. Appelbaum. I just said Mr. Appelbaum.

By Mr. Kohn:

Q. In other words, you mean "he"?

A. Yes.

Q. At that particular time?

A. Yes.

By the Court:

Q. It had not been paid?

A. Yes.

By Mr. Kohn:

214 Q. Mr. Fraustro, do you recall any other details of the conversation at that time between you and the defendant?

A. He showed different papers to prove he was giving good price for the product. He was working for the Reno Company, to sell the product at the best price.

Q. Mr. Fraustro, do you understand some English, do you not?

A. Yes.

Q. Do you feel that this is a fair and accurate translation that we are receiving from what you know about the two languages?

A. Yes.

Q. At your first conference with Mr. Appelbaum, was there an interpreter there?

A. No.

Q. When did you next see Mr. Appelbaum after the first day? If I understand it this conference was the first day you arrived, is that correct?

A. Next day.

Q. Who was present at that conference?

A. Present was himself and Mr. Appelbaum, his son, Bob, and he asked his brother, who is studying medicine here in Chicago to help him with the English.

215 Q. Your brother was conversant with both languages?

A. Yes. He was a medical student in Chicago at that time.

Q. Did you resume your discussion of your relationship of Reno to the defendant at that second conference?

A. He made Mr. Appelbaum understood.

Mr. Almonte: I think you are talking too low.

The Court: I can't hear a word.

By the Witness: (Through the interpreter.)

A. He made Mr. Appelbaum understand that the knowledge he had about the distribution of the product was not exactly proved by Nacional Financiera.

The Court: I still can't hear what you say.

By the Witness:

A. He made Mr. Appelbaum understand that he, his system of distribution was not according to the Nacional Financiera.

Mr. Kohn: If the Court please—pardon me. Finish the answer.

By the Witness:

A. There was a system that other Companies were following—was not approved by the Nacional Financiera.

That the Nacional Financiera did not found another
216 distributing company on the shrimp.

By Mr. Clayton:

Q. I did not hear you.

A. He made understand Mr. Appelbaum that the Nacional Financiera did not found the other distributing company.

Q. He did?

A. He did not. Nacional Financiera did not found, start the other distributing company.

Mr. Kohn: Just a minute. Let the Court Reporter just read that last answer and we will have a little recess.

The Court: Yes. I will decide on the recess.

Mr. Kohn: I said if we may.

(The last answer read as recorded above.)

Mr. Kohn: If the Court please, I have made arrangements for an interpreter that is used by the Bureau of Immigration and Naturalization.

The Court: I suggested when I was asked yesterday that you get someone from the Berlitz. Did you try that?

Mr. Kohn: She at the last minute could not make it. She recommended this gentleman. I suggest that we try to ask questions directly of the witness. I have had
217 no trouble understanding him without the use of an interpreter.

The Court: It is your interpreter. It is up to you. If the jury can understand the witness it is all right with me or else you better get a competent interpreter if you are dissatisfied. You provide the interpreter.

Mr. Kohn: It has been suggested that if Mr. Fraustro would answer questions in short sentences and the interpreter translate it literally by using the word "I" instead of "He" indiscriminately as he has been doing we might make progress with that suggestion.

The Court: If you want to get acquainted with your interpreter and maybe work out a few ground rules I will give you a 10 minutes recess to do that. You can see if the interpreter can understand you and if you can understand

each other, first and then maybe we can understand one or the other of you.

Mr. Kohn: Thank you.

The Court: I will give you a 10 minute recess.

(A recess taken.)

218 The Court: What have you arranged?

Mr. Kohn: Sir?

The Court: What have you arranged?

Mr. Kohn: The ground rules as you suggested, sir.

The Court: What are they, so I know them?

Mr. Kohn: First of all, the intent is to get his answers in short sentences and the translator interpret it and interpret it literally so that there will be no confusion about him, and I will try to ask simple questions if possible.

The Court: Splendid, if it can be accomplished. It will be a splendid feat.

By Mr. Kohn:

Q. Referring again to the second conference in the defendant's office, I would like you to tell the Court and Jury what you said and what Mr. Appelbaum said concerning your business relations?

A. Mr. Appelbaum told me that he was disgusted because the Nacional Financiera had not taken him into consideration in the formation of the new distributing company.

I told him that Nacional Financiera wasn't the founder of the new distributing company. There was a
219 spontaneous act of a group of producers of shrimp on the specific coast.

Q. Mr. Fraustro, you use the word "molesto" in Spanish. What is the English translation of that word?

A. Angry or angrily.

Q. You meant angered or bothered or annoyed?

A. Could be annoyed or disgusted.

Q. Do you recall anything else that was said at that conference?

A. I told him that Nacional Financiera had some changes of its directors. Nacional Financiera had made changes in its directors and that the first impression was given that the company or person would not be debts and that the first impression was that he was a person or company that would not pay his debts or its debts.

The Court: That who was?

The Witness: Mr. Appelbaum. The company, the im-

pression that the directors, the new directors, was that he was a person or company that would not pay his debts.

By Mr. Clayton:

Q. That he was a person of the company that would not pay his debts?

A. Person or company that would not pay his debts.

220 By Mr. Kohn:

Q. In other words, Mr. Fraustro, the remark was the new board had a bad impression of a person who would not pay his debts, is that correct?

A. Yes.

Q. Do you recall any other comments concerning the relationship between the two companies?

A. He told me he was a bad distributor of shrimp.

Q. Just a minute. Did he tell you that he was a good or bad distributor of shrimp?

A. Best distributor.

Q. Go on with the rest.

A. That Jack Willis couldn't compare to him.

Q. All right, sir.

A. He had a person that should be chosen for the new distributing company.

I told him that Nacional Financiera did not choose Jack Willis. He had the producers of shrimp who had created the new company, elected as president.

The Court: Just a minute. Everyone in the last row of the Jury is shaking their head that they can't hear you at all. I might just as well suspend court, either to get a competent interpreter who can speak and at least can

221 understand English also.

The idea is, listen to me a minute. The idea is that those people have to hear what you say, and I have to hear. Now, if you can't do it, get a competent interpreter.

Mr. Kohn: If the Court please, I think we can do it with the witness.

The Court: Will the interpreter read the last answer if he can?

(Last answer read as recorded above.)

The Court: Go ahead. There is more after that.

Mr. Kohn: If the Court please, I will suspend with this interpreter. I will ask two or three questions of the witness and if it doesn't work satisfactorily, I will set aside him and get another witness and then ask to resume.

The Court: What is the matter with this man who was on the stand yesterday afternoon? He speaks English and Spanish.

Mr. Kohn: If the Court please, I asked the defendant.

The Court: He is a party?

Mr. Kohn: He is a party.

The Court: He should not ordinarily be an in-
222 terpreter. This interpreter is fine if he will speak up.

Mr. Almonte: I will talk louder. I will make all possible—

The Court: The idea is the Jury has to hear it. If he speaks loud enough, instead of your whispering to the reporter. That does not help. Let us go ahead with the trial, with this man for a little while longer. I don't think I can understand the witness. I can't. Try him again, I think with one question and let us see what the Jury can do with that, about the interpreter.

By Mr. Kohn:

Q. I have asked you to give the details of the conversation in Mr. Appelbaum's office on that second day. Do you now recall any details relating to your business relationship?

A. Yes.

Q. You do?

A. Yes.

Q. That is in English?

A. In English?

Q. Yes. You answered, yes, did you not?

223 A. You see I can't understand your question.

Q. My question is, do you recall any other details other than those that have already been mentioned?

A. Yes. I offered him to work for Crest Importing Company. I can't speak.

Q. I see.

A. I can't speak English.

The Court: Try again with this man. Let us get on and not lose the whole day.

By Mr. Kohn:

Q. Under what conditions did you specify to Mr. Appelbaum, as the proposition, under what conditions did you specify?

A. What was that?

Q. Under what conditions did you specify such a proposition?

224 A. I told him that the contract with Reno was for one more year and that the intention of the new Company was for a longer time.

By the Court:

Q. With what?

A. For a longer time. That it was more intelligent for his part to find a way to work for Crest than to work in the same American one more year. He understood so and we started discussing the commission. He gave the following conditions: That he would work as a sub-broker for a commission of two and one-half percent. That he

225 had considered that action with Reno, and he asked the right to buy for himself the shrimp, that they would be cheap to him.

He wanted a guarantee of a production the same as the year before that Reno had given him.

Q. Mr. Fraustro, do you have something else to add?

A. He also wanted exclusive territory of Chicago and surrounding towns.

Q. Mr. Fraustro, did you say you saw Mr. Appelbaum the next day after this meeting?

A. He invited me to be with him Sunday at his ranch.

Q. You were there all during the day?

A. Yes, I was with him all day.

Q. Where were you during the evening?

A. In the night we returned to his house in Winnetka, and before leaving I asked him—

The Court: Louder. Now you are mumbling.

By the Witness:

A. (Continuing.) —if he has taken a final decision about the conditions of work.

By Mr. Kohn:

Q. Did you arrange with Mr. Appelbaum to meet him the next day?

The Court: Let us find out what he said. He

226 asked him if he had come to a decision. Did he answer.

Q. Let us get that before the next day. We are still on Sunday night. Find out if he answered. You have heard the conversation.

Mr. Kohn: Just a minute. If there is any misunderstanding, I beg your pardon.

The Court: I just said that he asked him Sunday night at his home in Winnetka if he came to a decision on his proposition.

Before you find out what Appelbaum said to him, you asked him what happened the next day.

I say hold the next day until we finish with Sunday night.

Do you understand me?

The Interpreter: Yes, sir.

The Court: Say it to the witness.

The Interpreter: He said, "Yes, they were his final conditions."

By Mr. Kohn:

Q. Did you make an appointment, Mr. Fraustro, to meet him the next day?

A. I made a date for the next day.

227 Q. Who was present? Did you see him the next day?

A. I called him on the phone telling him then I was not authorized to—

The Court: You are mumbling. Speak up.

The Interpreter: He told him that he was not authorized to resolve his conditions.

Mr. Clayton: That he was not authorized?

The Interpreter: On the conditions he had given him.

By the Witness:

A. (Continuing.) And the conditions of the operation of Crest. That I would talk to Jack Willis, the manager of Crest, to give him the conditions there were—to resolve on the conditions to be accepted.

The Court: Being accepted?

By Mr. Kohn:

Q. Well, now, Mr. Fraustro, was there a meeting in Mr. Appelbaum's office at which Mr. Jack Willis and Mr. Monroe Collenburg, who sits over there, and you and Mr. Appelbaum were present?

A. Yes, I believe that we got together. I called my lawyer, Mr. Collenburg, to sign any final documents. The next day we went to the office of Mr. Appelbaum, Mr. Jack Willis, Mr. Collenburg, and I.

228 Q. Were there two conferences on that day?

A. Yes, one in the morning and the other in the afternoon.

Q. Was an attorney by the name of Clinton representing the defendant present at one of them?

A. He called him after.

Q. After the conferences on that day, the day on which you had two conferences, did you have any further meetings with Mr. Appelbaum?

A. No.

Q. Did you return to Mexico shortly thereafter?

A. Yes.

Q. Did you then report the result of your negotiations to the board of directors of your company?

A. Immediately we made a meeting to get the report.

Q. As the result of that meeting, did the plaintiff then send a wire to the defendant on or about October 3rd, with relation to the contract?

A. They made a resolution to that telegram to Mr. Appelbaum.

The Court: What is that telegram? What is the exhibit number?

By Mr. Kohn:

Q. I hand you Plaintiff's Exhibit 12, and I ask you
229 if that contains the wire you refer to?

A. Yes.

Q. Mr. Fraustro, I hand you a document marked for identification as Plaintiff's Exhibit 21, which appears to be a letter dated August 6, 1953, and ask you if a copy of that letter was received by you?

A. Yes, I received a copy of that letter. This is the copy I received.

Mr. Kohn: If the Court please, this is a letter addressed by the defendant to this gentleman. It has the signature, Mr. Sprecher.

It is Plaintiff's Exhibit 21. I will ask that it be admitted in evidence. It has been exhibited to the defendant.

The Court: Very well, it may be received.

(Whereupon said document marked PLAINTIFF'S EXHIBIT 21 for identification was received into evidence.)

The Court: This is a letter from whom?

Mr. Kohn: From the defendant to Reno.

By Mr. Kohn:

Q. Mr. Graustro, I would like to ask you if the board of directors of Reno has ever taken any formal action at a meeting at which you were present?

230 A. Yes, they have.

Q. And in particular a resolution not to enter into any contract until the difficulties with the defendant Henry Appelbaum had been resolved?

A. The resolution was to communicate with Mr. Appelbaum that the Reno Company would comply with the contract—

Mr. Kohn: Just a moment. I don't know what the answer was. He has not translated it yes, but the question really called for a yes or no answer.

I move to strike the answer, which I have not heard yet.

The Court: Very well.

Mr. Kohn: Let us start all over again.

The Interpreter: He said, "Yes."

Mr. Kohn: No, no, let us start all over again.

The Court: Start all over again.

Mr. Kohn: The question calls for merely a yes or no answer.

By Mr. Kohn:

Q. The question was: Did the board of directors of Reno ever take any formal action at a meeting at which you were present?

231 The Interpreter: The answer is, "Yes."

Mr. Clayton: No.

Mr. Kohn: Well, that could be possible.

By Mr. Kohn:

Q. Well, more specifically resolving not to enter into a contract with anyone else until your difficulties with the defendant had been cleared?

Mr. Clayton: I object to that, your Honor. The resolution will speak for itself.

The Court: The objection is sustained.

Mr. Kohn: Well, if the Court please—

The Court: The interpreter has already answered it for the witness, so that answer will be stricken.

Mr. Kohn: If the Court please, I have here what is the certified copy of the corporate resolution, series of corporate resolutions of the plaintiff company duly attested, that is in Spanish. I want to introduce it in evidence.

The Court: You can have it translated. Go ahead. What do you want?

Mr. Kohn: One portion of a corporate meeting.

232 The Court: That is agreed to, is it, Mr. Clayton?

Mr. Clayton: Yes, sir.

The Court: Read the English translation of that portion that you are concerned with. You have the interpreter, so-called.

Mr. Kohn: I will ask the interpreter to translate for the Court and Jury this sentence (indicating).

Mr. Clayton: Before he interprets, your Honor, could I ask a question of information?

Do I understand that this is a resolution that was supposed to have been passed by the board of directors of Reno?

The Court: Is that right, Mr. Kohn?

Mr. Kohn: Yes, sir.

The Court: Concerning their action with respect to the defendant's contract, and their apparent decision according to what he represents—their apparent decision to make contracts with no one else until they had resolved the difference with the defendant.

Mr. Clayton: I submit that would be a self-serving declaration.

233 The Court: Of course it is. But, you said they could read it. That is the only reason I was going to let him read it.

Mr. Kohn: I withdraw it if they have any objection.

The Court: All right.

Mr. Kohn: You may cross-examine.

The Court: I think you better get over to the end of the Jury box there, Mr. Clayton. You speak low all the time.

Now, here, Mr. Interpreter, back here. Right there. Whoa.

Now, you talk loud enough so I can hear.

And, Mr. Interpreter, you talk loud enough so the man in the back row and those ladies can hear you. Look at him when you answer. If he cannot hear you, then you shout louder. Look at the man in the Jury box and not at Counsel.

Now, go ahead, Mr. Clayton.

Cross-Examination by Mr. Clayton.

Q. Mr. Fraustro, when did you first meet Mr. Appelbaum?

234 The Court: Don't go closer. Talk louder.

By the Witness:

A. In Chicago or in Mexico?

By Mr. Clayton:

Q. When did you first meet him?
A. I met him first in Mexico.
Q. When was that?
A. 1952.
Q. Refreshing your memory, would it be about the month of July?
A. Possibly.
Q. How many times did you meet him in Mexico?
A. Three times.
Q. Was one of these occasions in the month of July, 1953?
A. Yes.
Q. At the time that you met him in Mexico in July, 1953, you were aware of the fact that the telegram had been sent attempting to cancel his contract with Reno, were you not?
A. Yes.
Q. When you saw him in Mexico in July, 1953, he discussed the question of Reno attempting to cancel the contract, didn't he?

235 A. No.

Q. Did not he in July, 1953, ask you about the telegrams which had been sent, and you told him to take the matter up with Mr. Pinson?

The Interpreter: Put the question a little shorter.

By Mr. Clayton:

Q. Did he discuss the attempted cancellation of his contract with you?
A. No.
Q. You told him to discuss the matter with Mr. Pinson who was then in Mazatlan?
A. Yes.
Q. After that conversation, Mr. Appelbaum went to Mazatlan to see Mr. Pinson, did he not?
A. I believe he did.

Q. You saw him again in Mexico City after he had returned from his conference with Mr. Pinson?

A. Yes.

Q. During those conversations, he told you his contract ran until 1954, didn't he?

A. Yes, he told me.

Q. He also told you that Reno had no right to cancel his contract, didn't he?

236 A. Possibly.

Q. Now, it was after you had seen him in Mexico and had those conversations with him that you came to Chicago?

A. Yes.

Q. Before coming to Chicago, had you received or had you seen any communication from Mr. Appelbaum in which he requested that a representative be sent here?

Mr. Kohn: Just a moment. If the Court please, I have been advised that that last comment was not properly translated.

So, I will ask Mr. Clayton—not the last question, but the one before that.

The Interpreter: Make it a short one.

Mr. Clayton: Concerning the—

Mr. Kohn: Maybe the Reporter should read it.

By Mr. Clayton:

Q. It was after you had these conversations in Mexico with Mr. Appelbaum that you came to Chicago?

A. It was after, but it was not the result of those conversations.

The Court: I do not hear your answer.

The Interpreter: It was after, but it was not in connection with those conversations.

The Court: I still did not understand. It was

237 after what?

The Interpreter: It was after, but not in connection with the conversations with him.

The Court: It was after, but not in connection?

The Interpreter: Not in connection with his conversations.

By Mr. Clayton:

Q. But you did come after those conversations, didn't you?

A. Yes.

Q. I understood you to say when you went to his office on September 18, 1953, you went alone, is that correct?

A. Yes.

Q. You did not have an interpreter with you then, did you?

A. No.

Q. Was it your brother-in-law that was studying medicine here?

A. My brother.

Q. Your brother was not with you on this occasion, was he?

A. In the office of Mr. Appelbaum? No.

Q. At that meeting on September 18th you discussed the relationship between the defendant and Reno, did you not?

238

A. Yes.

Q. Mr. Appelbaum spoke in English, did he not?

A. Yes.

Q. You spoke in English, did you not?

A. Very bad English.

Mr. Clayton: I did not hear you, sir.

The Interpreter: In bad English.

By Mr. Clayton:

Q. I understood you to say that on this occasion Mr. Appelbaum's son was present?

A. Yes.

Q. You stated that he, Mr. Appelbaum, had requested that a representative be sent here, is that correct?

A. Yes.

Q. Did you ask him why he wanted a representative sent here?

A. Yes, I asked him.

Q. What did he tell you?

A. He had asked for an authorized representative.

Q. Did you ask Mr. Appelbaum why he wanted an authorized representative sent to Chicago?

A. Yes, I asked him.

239

Q. What did Mr. Appelbaum tell you?

A. Because in Mexico the board of directors was influenced by Mr. Pinson.

Mr. Clayton: What was that?

The Interpreter: The answer was because the board of directors in Mexico was influenced by Mr. Pinson.

By Mr. Clayton:

Q. He told you that he wanted a representative sent here, because the board of directors was influenced by Mr. Pinson, is that correct?

A. Yes.

The Interpreter: "Yes," that was the answer.

By Mr. Clayton:

Q. What was Mr. Pinson's connection with Reno at that time?

A. He was and is the general manager.

Q. He was what?

The Interpreter: And is the general manager.

By Mr. Clayton:

Q. Was the general manager. Now, did he tell you anything else about why he wanted a representative sent here?

A. To have the occasion of showing his papers.

240 The Court: I cannot hear you.

The Interpreter: To have an occasion to show him his papers.

By Mr. Clayton:

Q. Did he say he wanted the representative here for any other reason?

A. I don't remember what other reason.

Q. By way of refreshing your memory, did he state he wanted a representative here to discuss the question of Reno's attempted cancellation of his contract?

A. No.

Q. In that conversation, didn't he tell you that Mr. Pinson was attempting to influence the board of directors against him, Mr. Appelbaum?

A. Yes, Mr. Appelbaum told me.

Q. At that conference, you say Mr. Appelbaum told you that he was one of the best shrimp distributors in the United States?

A. Yes, he told me.

Q. Didn't he show you books and records to substantiate that?

A. Only invoices and correspondence.

The Court: I cannot hear you.

The Interpreter: Just invoices and correspond-

241 ence.

By Mr. Clayton:

Q. He showed you invoices and correspondence, did he not? The invoices which he showed you reflected the sale and the shipment of shrimp?

A. They were photostatic copies of other American distributors.

Q. Did not these invoices disclose that he was the greatest shrimp distributor?

A. No.

Q. What did they disclose with respect to the amount of sales that he made as compared with the other distributors?

A. That other companies had sold a different kind of shrimp at a different price.

Q. Did the invoices show any other distributors that were selling the same kind of shrimp that he was selling?

The Interpreter: The trade-marks were different, but he does not know if they correspond to the same kind.

By Mr. Clayton:

Q. At that time you stated that he told you he wanted to discuss a problem that existed between himself and Reno, did he not?

242 A. Yes.

Q. What did he tell you that problem was?

A. The change of opinion that Reno Company had had.

Q. The change of what?

The Interpreter: Of opinion that the Reno Company had had.

By Mr. Clayton:

Q. The change of opinion. Did he tell you that one of the problems was that Reno was attempting to cancel his contract before it expired?

A. First Reno communicated with him, that it was desired to cancel the contract.

Mr. Clayton: I did not hear you.

The Interpreter: First the Reno Company communicated with him their desire to cancel his contract.

By the Witness:

A. (Continuing.) And later—

Mr. Clayton: Your first statement, what did you say?

The Interpreter: That the Reno Company communicated with him.

The Court: "Communicated," he is saying.

The Interpreter: And its desire to cancel the 243 contract.

The Court: I am the interpreter for the interpreter.

By the Witness:

A. (Continuing.) And later communicated that the contract would continue.

By Mr. Clayton:

Q. Did they communicate with Mr. Appelbaum telling him that the contract would continue before you came to Chicago?

A. No.

Q. So when you were here in Chicago, his problem was this attempted cancellation of the contract, wasn't it?

The Interpreter: Put it again, please.

By Mr. Clayton:

Q. So, when you came to Chicago, the problem that he wanted to discuss was the attempted cancellation of his contract?

A. No.

Q. What was the problem?

A. To establish the cordiality in the relations between the Reno Company and Mr. Appelbaum.

Mr. Clayton: Now, I will ask that you please mark 244 these Defendant's Exhibits 4, 5, 5-A, and 6 for identification.

(Documents so marked.)

By Mr. Clayton:

Q. I show you, Mr. Fraustro, Defendant's Exhibit 4 for identification, purporting to be a letter from Penguin Frozen Foods to Sr. Don Oscar Fraustro, and ask you to look at that and tell the Court and Jury whether you have seen the original of that letter?

A. Yes, I received it.

Q. Now, will you tell the Court and Jury the date of that letter?

A. I don't remember.

Q. Will you tell the Court and Jury the date that that document bears?

A. March 6, 1953.

Q. That was prior to the time that you were in Chicago?

A. Yes.

Q. That was a letter concerning this attempted cancellation of his contract, wasn't it?

245 Mr. Kohn: If the Court please, I object to that question on the ground that the letter speaks for itself.

The Court: The objection is sustained.

By Mr. Clayton:

Q. Now, I show you Defendant's Exhibits 5 and 5-A, 5 being a purported letter from Oscar Fraustro to Henry Appelbaum in Spanish, and 5-A being its translation in English, and I ask you to look at that and state whether or not Defendant's Exhibit 5 is a copy of a letter which you sent to the defendant on the date it bears?

A. Mr. Appelbaum wrote to me because I was the only person that—

Mr. Clayton: Just a minute.

The Court: I cannot hear the answer, so I cannot rule on your motion.

The Interpreter: Mr. Appelbaum wrote that letter to him, because he was the only person that could influence the National Financiera.

The Court: The answer may be stricken. It is not responsive.

You did not translate the question. I know that much about Spanish. His question lasted three or four

246 seconds, and you translated it like that (indicating).

Now, the question is.

Now, listen to it and translate it.

By Mr. Clayton:

Q. Is Defendant's Exhibit 5 a copy of the letter which you wrote to the Defendant?

The Court: Yes or no.

The Interpreter: He asked me—

The Court: Answer yes or no.

By the Witness:

A. Yes.

By Mr. Clayton:

Q. That was sent by you to the defendant on the date that letter bears?

A. Yes.

Q. That was prior to your coming to Chicago?

A. Yes.

Q. I now show you, Mr. Witness, Defendant's Exhibit 6 for identification, and ask you to look at it and state whether this is a copy of a letter which you received from the defendant?

A. Yes, I received this letter.

Q. This was also before you came to Chicago?

A. Yes.

247 Q. With respec to this first meeting, Mr. Fraustro, did not you when you went to the office of Mr. Appelbaum—

The Interpreter: What?

Mr. Clayton: I will withdraw that.

The Interpreter: Yes.

By Mr. Clayton:

Q. When you went to the office of Mr. Appelbaum, didn't you offer to give him $12,000 to adjust the whole situation?

The Interpreter: Was it pesos or dollars?

Mr. Clayton: $12,000.

By the Witness:

A. No, sir.

By Mr. Clayton:

Q. Did Mr. Appelbaum state to you that he would not be interested in such an offer?

A. I don't remember this offer.

Q. Didn't he at that first meeting in his office in Chicago tell you that he wanted Reno to continue with this contract with him?

A. Maybe.

Q. Now, the next meeting was the next day I think you said, is that correct?

A. Yes.

248 Q. Was that meeting at the home of Mr. Appelbaum, or was it at his office?

A. In his office.

Q. The first meeting was on what day, the 18th or 19th?

A. I don't remember exactly.

Q. At the second meeting the only persons present were yourself and Mr. Appelbaum, isn't that correct?

The Interpreter: No, his brother and the son of Mr. Appelbaum were present, too.

By Mr. Clayton:

Q. At the second meeting, your brother was a mere visitor with you, who came along with you, wasn't he?

A. I took him there so he could help me with the English.

Q. He did not participate in any of the discussion, did he?

A. Yes, he helped me.

249 Q. This discussion that you say he participated in was still concerning Reno and its attempted cancellation of his contract, wasn't it?

A. It was about the relations between the two Companies.

Q. You said he may be—

The Interpreter: It was about the relations of the two Companies.

By Mr. Clayton:

Q. That is, Reno and the defendant?

A. Yes.

Q. At that time did you make an offer to him?

A. No.

Q. You did not?

When was it that you made the offer to have him work for Crest as a sub-broker?

A. At the second meeting.

Q. It was at the second meeting that you made him an offer, wasn't it?

A. The offer to work for Crest.

Q. The question was, Mr. Witness, at the second meeting you did make him an offer—not what the offer was. We will get to it. You did make him an offer at this meeting, didn't you?

A. Yes, I made the offer, but the offer was to 250 work for Crest.

Q. This offer that you made to him at that time was that he, the defendant, work for Crest as a sub-broker, isn't that correct?

A. Yes.

Q. You at that time told him the commission that he would receive as a sub-broker from Crest, didn't you?

A. Yes.

Q. He told you, did he not, that he would listen to what you had to say, but he still wanted Reno to live up to the terms of their contract, didn't he?

A. He wished to keep the Reno contract.

Q. He did wish to keep the Reno contract; during the course of your offer that you were making to him, did he ask you the amount of shrimp that he would receive if he considered that offer?

A. He said make arrangements with Crest so he will receive important volume of produce!

Mr. Clayton: Keep your voice up.

The Interpreter: He will make arrangements with Crest so he will receive an important amount of produce.

By Mr. Clayton:

Q. You mean that you told Mr. Appelbaum that
251 you will make arrangements with Crest whereby Mr. Appelbaum would receive a considerable amount of shrimp from Crest?

A. Yes.

Q. Did you tell him the amount of shrimp which he would be able to receive from Crest as a sub-broker?

Mr. Kohn: If the court please, I object to that question. There was nothing gone into on the direct testimony of this witness about any hypothetical arrangement in the future along those lines.

The Court: He is covering the second conversation at the second meeting. He went into the conversation that was had at the second meeting. If he is bringing out parts of it that you did not bring out, that is proper on cross-examination. He still is asking what happened at the second meeting.

Aren't you?

Mr. Clayton: Yes.

The Court: That is proper.

The Interpreter: What is the question?

The Court: Restate the question for him now.

By Mr. Clayton:

Q. Did you tell Mr. Appelbaum how much shrimp he would receive from Crest if he decided to be a sub-broker?

252 A. I did not tell him.

Mr. Clayton: He did not is his answer?

The Interpreter: "I did not."

By Mr. Clayton:

Q. Did Mr. Appelbaum say to you at that time that he

could not consider such an offer because he had commitments himself?

The Interpreter: What was the end of that?

Mr. Clayton: Because Mr. Appelbaum had obligations?

By The Witness:

A. Yes, he told me.

By Mr. Clayton:

Q. During the same conversation, didn't Mr. Appelbaum ask you what guarantee would he have that the production which he would receive from Crest—

The Interpreter: Wait a minute, that is to long.

Mr. Clayton: All right.

By Mr. Clayton:

Q. (Continuing.) —would be the same as he had received the year before?

A. Yes, he told me.

Q. Did you tell him what guarantee you would give him?

253 The Interpreter: No, he won't guarantee precisely.

Mr. Clayton: When you say, "he" you mean—

By Mr. Clayton:

Q. You told Mr. Appelbaum?

The Interpreter: I translate his words, "I couldn't precisely give guarantee."

By Mr. Clayton:

Q. You told Mr. Appelbaum that you could not give him any guarantee, didn't you?

A. Yes, I told him that I could not give no guarantee.

Q. You were sent here as an authorized representative of Reno, weren't you?

A. Of Reno, yes, but not of Crest.

Q. Did you hold any office with Crest?

A. No.

Q. Your conversation was concerning Mr. Appelbaum's relinquishing his contract for shrimp which he had with Reno and enter into an arrangement as a sub-broker for Crest?

The Interpreter: That is to long. Put it again.

By Mr. Clayton:

Q. Your conversation at this conference was con-

254 cerning Mr. Appelbaum releasing his contract which

he had had with Reno and entering into an arrangement as sub-broker with Crest, wasn't it?

A. Yes.

Q. You still could not give him any guarantee as to production, could you?

A. No, I couldn't.

Q. Did you at that time, Mr. Appelbaum that if he did accept that arrangement that his territory would be limited to Chicago and the surrounding towns?

A. No, I did not tell him.

Q. What did you tell him, if anything, as to the territory that he would be permitted to distribute shrimp in if he accepted the arrangement as a sub-broker for Crest?

A. I wasn't able to precise him a territory.

Mr. Clayton: What?

The Interpreter: He could not precise a territory.

By Mr. Clayton:

Q. You said, "I could not" do what? "I could not precisely or describe it, the territory, "is that what you mean?

A. No, there was no limit.

Q. You could not tell him the limits of his territory, could you?

255 A. I couldn't.

Q. About how long were you in conference with Mr. Appelbaum on this occasion, at the second?

A. I don't remember but I think it was all morning.

Q. Before you left, did not you tell him that you would contact Mexico and let him know what you could do?

A. No.

256 Q. The next conference was the next day, is that correct? That is, the third conference?

A. It was at his house in Winnetka Sunday night.

Q. The only persons present, I presume, were yourself, Mr. Appelbaum, and possibly some members of his family, is that correct?

A. At the conference?

No, just him and I.

Q. Was your brother with you?

A. No.

Q. You did not need him to help you on that occasion?

A. No.

Q. By the way, Mr. Appelbaum was not speaking Spanish, was he?

A. Very little.

Q. Very little. Now at that meeting what, if anything, did you tell Mr. Appelbaum about the offer which you had made to him the day before?

A. I asked him if he had taken the final decision.

Q. What did he tell you?

A. He told me that he accepted to work as a sub-broker.

Q. That he accepted to work as a sub-broker.

The Interpreter: Sub-broker.

257 By Mr. Clayton:

Q. At that time all that you had told him concerning his working as a sub-broker is what you have told the Court and Jury today, is that correct?

The Interpreter: Put the question again.

Mr. Clayton: I will put it this way.

The Court: What?

Mr. Kohn: He will put the question again.

By Mr. Clayton:

Q. So you told Mr. Appelbaum what territory he would be limited to?

A. No. I? No.

Q. Had you told him the amount of production he could expect to receive from Crest?

Mr. Kohn: Just a moment. If the Court please, that question again has been stated at least two or three times. It is repetitious.

The Court: I will let him answer it again.

By Mr. Clayton:

Q. Will you answer, sir?

A. That I could ask Crest that they ship him approximately the same quantity that he had received the year before.

Q. Did you tell him you could guarantee that production?

258 A. No.

Q. Without telling him that you guaranteed the production, he said he would accept as a sub-broker, is that correct?

A. He put that as a condition.

Q. Did you guarantee production?

A. I did not.

Q. Did I understand you correctly to state that he said, that is, Mr. Appelbaum said that he would accept as a sub-broker if you guaranteed production?

A. Yes.

Q. You told him that you could not guarantee production, didn't you?

Mr. Kohn: If the Court please, I think this is now about the sixth or seventh question along that line.

The Court: I think it is getting repetitious. I don't mind three, but three times three should be out, don't you think?

Mr. Clayton: I think so.

By Mr. Clayton:

Q. Now, with respect to that next meeting, when was that?

A. Two days later.

259 Q. Who was present at the time of the fourth meeting?

A. Mr. Jack Willis, manager of Crest, Mr. Collenburg, the lawyer, Mr. Appelbaum, his son, later arrived Mr. Clinton, and myself.

Q. At this fourth meeting, that discussion was about what?

A. Mr. Appelbaum and Mr. Willis discussed the conditions of the operation.

Q. Before going to that meeting, you made a telephone call to the defendant, didn't you?

A. The day before.

Q. During that telephone conversation, you told him you wanted an opportunity to decide about an offer, didn't you?

A. Yes, because I needed to know the opinion of Mr. Willis.

Q. During this conference with Mr. Willis, Mr. Collenburg, Mr. Clinton, Mr. Appelbaum at that time stated that he considered his contract with Reno still in force and effect didn't he?

Mr. Kohn: One momento. Pardon me. I am trying to use a little Spanish here—badly, too.

If the Court please, on direct examination the only

260 questions asked by us was to the existence of such a conference and who was present. I did not ask him what was said there. So, that this now goes beyond the scope of direct examination.

The Court: I think, strictly speaking, it does. But, this much is of sufficient importance to the Jury and will explain what was being discussed there, so I will let him answer.

If he can remember the question—I don't think he can.
The Interpreter: That was long.
The Court: Yes. You had better restate it now. I will let it go that far.

By Mr. Clayton:

Q. At this conference, didn't Mr. Appelbaum state that he considered his contract with Reno still in effect?

A. Yes, he said.

The Court: I think that goes about far enough with that.

By Mr. Clayton:

Q. There was another meeting, was there not?

A. The same day, in the afternoon.

261 Q. Who was present at that meeting?

A. Mr. Appelbaum, Mr. Clinton, Mr. Collenburg, and I.

Q. At that meeting, did not Mr. Collenburg, after there had been a discussion, state that the only thing to do is to go through with the contract? Didn't he make that statement?

A. Yes.

The Interpreter: That was, "Yes."

Mr. Clayton: What was that?

The Interpreter: That was, "Yes."

By Mr. Clayton:

Q. In other words, he did make that statement?

Mr. Kohn: If the Court please, I will make the same objection.

The Court: Yes.

Mr. Kohn: With respect to both conferences, there were no direct questions as to their conversation.

The Court: To the extent it was covered on cross examination, the objection is overruled. I don't want to go further than that. I will allow one general question.

Mr. Clayton: Will you excuse us?

The Court: Certainly.

262 Mr. Clayton: No further cross.

The Court: Very well. Is there any further redirect?

Mr. Kohn: I have one or two questions.

263 Q. Mr. Fraustro, you said there were conferences on the same day, is that correct?

A. Yes.

Q. Are you sure of that, did you state that Mr. Clinton was present at both conferences?

A. Yes.

Q. Are you sure that he was there in the afternoon, too?

A. Yes.

Mr. Kohn: That is all.

The Court: Anything else? Any recross, Mr. Clayton.

Mr. Clayton: No recross.

The Court: That is all. You may step down.

(The witness excused.)

The Court: Call your next witness.

Mr. Kohn: I will call Mr. Collenburg, now.

The Court: That is all, Mr. Interpreter.

MONROE COLLENBURG, called as a witness on behalf of the plaintiff herein, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Kohn.

264 Q. Will you please state your name?

A. Monroe Collenburg.

Q. What is your occupation or profession?

A. I am an attorney.

Q. Where do you live?

A. In New York City. That is just outside of New York City.

Q. Are you a member of the New York Bar?

A. I am.

Q. Have you represented the plaintiff in various matters?

A. Not the plaintiff, no, in no matter except this particular matter.

Q. You have represented the plaintiff in this particular matter?

A. Just in this particular matter, yes.

Q. Calling your attention to the month of September, 1953, were you in Chicago?

A. Yes, I was.

Q. And towards the 18th or thereabouts?

A. I came on the 22nd.

Q. For what purpose?

A. Well, because Mr. Fraustro had called and wanted an attorney to come to see him in Chicago.

265 Q. Did you meet Mr. Fraustro in Chicago?

A. I did.

Q. On or about what date?

A. On the 22nd, that night.

Q. On the night of the 22nd?

A. Yes.

Q. Did you see the defendant on that day or night?

A. You mean Mr. Appelbaum?

Q. Yes.

A. No, I did not.

Q. When did you see him?

A. I saw him two days later, on the 24th.

Q. At a conference?

A. That is right.

Q. Regarding the relations between Reno and the defendant?

A. That is correct.

Q. Will you state who was present at that conference?

A. Mr. Fraustro and Jack Willis and I went to the conference and when we got there Mr. Appelbaum and his son, Bob, were there. But right after Mr. Fraustro introduced me and told Mr. Appelbaum I was a lawyer for Nacional Financiera from New York, then Mr. Appelbaum said he thought he ought to have a lawyer too. So he

266 called and a few minutes later, Mr. Clinton came over and joined the conference.

Q. Did you represent Nacional Financiera as well as Reno in this conference?

A. Yes. Primarily we represent Nacional Financiera. They are clients of ours in New York.

Q. Mr. Clinton joined the conference?

A. That is correct.

Q. Do you recall what was said by the defendant with respect to his relationship with the plaintiff?

A. Yes, I do.

Q. Will you state what that was?

A. Well, the conference started off with Mr. Appelbaum and Mr. Willis discussing the question of Mr. Appelbaum being a part of this new organization that had been formed on the West Coast of Mexico marketing shrimp in the United States.

They discussed the possibilities and the conditions under which Mr. Appelbaum and his Company could be the same

brokers of the Crest Company, which was stated at the conference were going to be the ones that would import the shrimp into the United States and be the main distributors for several of the West Coast of Mexico
267 producers including the plaintiff.

The discussion, I think went on about an hour and a half, maybe two hours, just primarily between Mr. Appelbaum and Mr. Willis and Mr. Willis, as I recall it, offered to have Mr. Appelbaum work as a sub-broker for him on a basis of two and one-half per cent commission; and they went into the various matters of the terms of the sub-brokerage and the conditions.

Mr. Appelbaum stated his conditions he would have to insist on if he was to take a sub-brokerage like that. One of the things was he wanted to know about his territory and as I recall it, he insisted on having Chicago and I think all of Illinois as an exclusive territory for the sale of the shrimp and he also wanted the right to sell exclusively to certain customers of his in some of the other cities. I recall, for instance, there was some firm in Pittsburgh that he said was an excellent customer. He wanted to be able to sell them. There was another one. There was one in New York and I think one in Buffalo and one in Milwaukee and I think one in Cleveland. There may have been one or two others. He named about 6 or 7 Companies. I don't recall their names.

Q. Were those conditions rejected?

A. No, they were not. They seemed to be agreeable to Mr. Willis, but then Mr. Appelbaum stated he would
268 also want the right to be a Buyer of shrimp in addition of being a Seller of Shrimp and he stated to all of us that he felt that he knew so much about the shrimp market that he was sure he would be able to sell the shrimp at higher prices than what Jack Willis would set. Therefore, he wanted to have the opportunity if he felt the market was— If a quantity of shrimp could be sold higher than what Jack Willis was offering for, he would buy it himself and then sell it himself and make that extra amount of money.

Q. Mr. Collenburg, will you tell us exactly who Jack Willis is?

A. Jack Willis I had just met the day before and he was introduced to me by Mr. Fraustro as being the new head of the distributing company that was bringing the

shrimp into the United States, that is, the Crest Importing Company which has just been formed a few months before.

Q. Then, were those additional conditions that the defendant mentioned, agreed upon?

A. No. Jack Willis said he could never accept such conditions. He felt that when a person was going to act as a broker they could only act as a broker. It would be completely unfair to a principal to have a man in a position where he could either be buying for himself or
269 be buying for an outsider. And he pointed out the fact that, he said for instance, suppose we raise the price, how do we know that you won't say that you just bought it the day before for yourself at a lower price. We would have no control over the distribution. He would not agree to that.

Q. The negotiations looking forward to having the defendant join in this new proposal failed, is that correct?

A. Well, there was—before they failed, Mr. Appelbaum made another alternative. He said, well, if that—if he were not allowed to do that then he would want a situation where they would guarantee him the same amount of pounds of shrimp to be sold that he had received the year from Reno and also that they would have to guarantee him the gross amount that he made the year before on the sale of shrimp which he said was somewhere between 60 and 70 thousand dollars that he grossed. If that were guaranteed to him he would still go along.

Q. What was the response to that proposition?

A. Mr. Willis said he certainly couldn't guarantee it. Mr. Fraustro said he couldn't. He didn't think that could be guaranteed.

Willis pointed out that nobody could guarantee how
270 much shrimp is going to be caught and he said he wasn't going to start off with an organization where one distributor, one sub-distributor like Mr. Appelbaum would be getting a guarantee of the amount that they were going to catch the next year, which might be unfair to the rest of them that were going to be in the organization. He said that he would treat him fairly but he would not give him a guarantee.

Q. Were any other propositions considered at that meeting?

A. After that thing went along that way, for quite some time, and it looked as though they were not getting together, then Mr. Fraustro or I stated to Mr. Appelbaum,

was there any possibility of settling the thing whereby he just retired, got out of the picture completely? In other words, what would he take to give up his claim to a contract with Reno for the next year.

He asked us then, well, what do you offer?

I said it because I had been told by Mr. Fraustro, from Fraustro. Maybe Mr. Fraustro did.

Mr. Clinton: I object to the witness saying he had been told by Mr. Fraustro.

Mr. Kohn: No. He said, "I had been told."

271 By the Witness:

A. I had been told.

By Mr. Kohn:

Q. When you say—

A. We made an offer to him of $20,000.00. I think I made the offer. He did not. I said, he said.

Q. Just a minute, Mr. Collenburg. You are going a little too fast.

Mr. Kohn: There is a question, Mr. Reporter, I don't believe you got.

By Mr. Kohn:

Q. Did he accept it? The question is did he accept at that time?

A. No, he did not. He told us that offer was entirely inadequate. He pointed out at that time of September the shrimp season was just about to start around the 1st of October; that he had his whole organization built up and that he didn't have any other source of supply that he could go to readily to take care of the coming year's business and for that reason he was in a spot to get other supply. And then, therefore, he said, "I should get the same, at least the same gross amount and offer just to take care of his expenses at that time."

In addition, he said, "I have made commitments
272 to a number of my good customers who expect me to supply shrimp to them. I have promised I would and I have promised Reno shrimp but I am afraid, I am sure I am going to lose some of that business."

He said, "All that put together, I think I am entitled to $100,000.00."

Q. And did you accept that offer?

A. No. We said, of course, we had no authority to do that. We would go back and call Mexico and see whether

they would approve and see if they would approve the offer that we had made of $20,000.00.

Q. Did the meeting break up on that note?

A. That is right. It broke up with the arrangement we would come back in the afternoon after we had spoken to Mexico and see if we could make any better offer to him.

Q. Did you come back?

A. Yes, we came back about 3 or 4 o'clock that afternoon.

Q. Who was present?

A. Well, at that time, as I recall it, it was just Mr. Willis, Mr. Fraustro and I came to Mr. Appelbaum's office and I believe just Mr. Appelbaum and his son, Bob, were present.

273 Q. You don't believe Mr. Clinton was there?

A. I don't think so. I don't recall him being present in the afternoon at all.

Q. What was said to Mr. Appelbaum and what did he say in reply to a settlement of this matter?

A. Well, I told him that we had consulted Mexico and that we had been authorized to offer him $40,000.00 to wipe the whole thing out and that he would be out of the picture completely if that would settle the whole thing.

Q. Did he accept that offer?

A. No. He said absolutely not. He would not take a cent less than $100,000.00.

Q. Was anything further said at that conference?

A. Yes.

Q. About the relations between the parties?

A. Yes. This conference only took about 10 minutes, I think, maybe less than that even. Right after that I said, "Well, we can't do anything further then."

Then we stood up to leave and just at that moment, as I recall it, Mr. Fraustro said something to him.

He said, "Well, Henry, you were speaking something about guarantees."

And I said, "Well, I didn't understand that Mr. Appelbaum was asking for guarantees."

274 And I said to him, words something like this, "As I understand the situation is, you say you have a good contract with Reno for the balance of the year. Are you ready to perform it. You want us to do it, isn't that so?"

He said, "Yes. That is it exactly."

With that we left.

Q. In the course of that last conference, did you ex-

plain to Mr. Appelbaum or did Mr. Fraustro explain to Mr. Appelbaum the basis of the $40,000.00 offer and how it was reached?

Mr. Clayton: I object to that, your Honor.

By the Witness:

A. I don't think so.

The Court: Just a moment.

Mr. Clayton: I will object to that.

Mr. Kohn: I will withdraw the question.

By Mr. Kohn:

Q. Did you make any statements in the course of that conference as to wether or not the contract for the supply of shrimp to the defendant was still in force or that the revocation was ineffective?

A. I don't think I did. I don't recall. I may have
275 said, expressed my opinion, but personally, I felt his contract with Reno—

Mr. Clayton: I will object to that, if the Court please.

By the Witness:

A. I don't recall exactly.

Mr. Kohn: He said he did not recall. I will consent to striking the rest of that statement.

By Mr. Kohn:

Q. That was the only conference, that was the last conference you participated in with Mr. Appelbaum in Chicago, is that correct?

A. In Chicago, yes.

Q. Did you have any other communication?

The Court: I think this is a good point in which to stop before you get into the next one. We will recess until 2 o'clock.

(Whereupon at 12:30 o'clock p.m. a recess was taken until 2 o'clock p.m. of the same day being Thursday, June 9, 1955.)

276 Before Judge Wm. J. Campbell, and a jury on

Thursday, June 9, at 2 o'clock p.m.

Court convened pursuant to a recess.

Present:

Mr. Louis A. Kohn, Mr. Cornelius B. Kennedy, Mr. Patrick O'Brien, appeared on behalf of the plaintiff;

Mr. Robert A. Sprecher, and Mr. Joseph Clayton, appeared on behalf of defendant.

277 (The following proceedings were had in the court-room in the presence and hearing of the jury.)

The Clerk: Case on trial.

The Court: Have the witness resume the stand.

MONROE COLLENBURG, a witness on behalf of the plaintiff, being heretofore previously sworn, resumed the stand and testified further as follows:

Direct Examination (Resumed).

The Court: You may proceed with the direct examination.

By Mr. Kohn:

Q. Mr. Collenburg, after the conference in Chicago that you testified to this morning, did you communicate with Mr. Appelbaum?

A. Well, I had a telephone conversation with him a few weeks later.

Q. Do you remember the date?

A. Yes, sir. I checked the records and I found out, I assured myself it was the 14th of October. I may have had one after that too, but I am sure of the 14th.

Q. Did you call Mr. Appelbaum or did Mr. Appelbaum call you?

A. No. I called him.

278 Q. What did you say to Mr. Appelbaum?

A. I told him that I had been in touch with the people in Mexico and they had told me—

Q. Speak up a little louder.

A. I told him that I had been in touch with the people

in Mexico and they had told me that they had not received payment for the shrimp that he had already sold and for which he had not remitted. That he hadn't given them any assurance that he was going to pay up and I asked him, "What are you going to do about paying up for what you have sold and have not remitted?"

Q. What did Mr. Appelbaum reply?

A. He said, "What guarantee am I going to have that they are going to go ahead with the contract?"

I said, "Mr. Appelbaum, when I was with you back in September, the last thing was that you were going to go ahead with the contract as we did and now they told you they are, and I assure you they are and it is up to you now to go ahead too."

And I said, "They consider it and so do I a breach of contract on your part now and I think really you ought to consult your lawyer before you make a final decision on it."

And I asked him also, "How much is it which you
279 now owe for what you have sold?"

He said, "I don't know the exact figure." He mentioned it was around $140,000.00 worth.

Q. What was that date again?

A. October 14.

Q. 1953?

A. That is right. In the course of the conversation he asked me if I would guarantee him.

Q. What was your reply?

A. I said I am only a lawyer, Mr. Appelbaum, we can't go guaranteeing anything. I am just practicing law.

280 Q. What was your reply?

A. I said, "Well, I am only a lawyer, Mr. Appelbaum. I can't go guaranteeing anything. I am just practicing law."

Q. Was there anything further said in that conversation, if you remember?

A. I think he asked me whether Nacional Financiera would guarantee it.

I said, "I have not the slightest idea, but I will communicate your request to them, and it is up to them."

Q. Anything further?

A. No, I don't think so. That is about where we left it.

Mr. Kohn: You may cross-examine, at this time.

Cross-Examination by Mr. Clayton.

Q. Mr. Collenburg, you were, prior to this meeting in Chicago and at that time, representing Nacional Financiera, were you not?

A. In New York.

The Court: Will you speak louder, Mr. Clayton. I cannot hear you.

281 By Mr. Clayton:

Q. You were, prior to this meeting in Chicago and at the time that you came to Chicago, representing Nacional Financiera, were you not?

A. In New York City, yes.

Q. In New York City?

A. That is right.

Q. When you came here, of course you came here representing whom?

A. Nacional Financiera.

Q. When you came here as a representative for Nacional Financiera, you met with Mr. Willis in Mr. Appelbaum's office, did you not?

A. Well, I first met Mr. Fraustro the night I arrived.

Q. And then later—

A. The next day I met Mr. Willis and the third day we went to Mr. Appelbaum's office.

Q. Mr. Willis was then the representative from Crest Importing?

A. That is correct.

Q. You were familiar with this set-up of Crest, weren't you?

A. I was not. I knew nothing about it.

Q. Were you familiar with the organization known
282 as Exportadores Associados?

A. Mr. Clayton, I had never heard of the entire thing until the night I arrived in Chicago. I came here, having been told that I should come over, that some papers they expected to sign and see that they were legally correct and sufficient.

Q. When you went to the office of the defendant with Mr. Fraustro and Mr. Willis, you had a conversation concerning the contract which Mr. Appelbaum had with Reno?

A. Well, at the start there was nothing about the contract. There was a conversation of how and under what

conditions Mr. Appelbaum could be a sub-broker for this new organization, the new Crest set-up.

Q. He stated certain conditions which would have to be met before he would consider becoming a sub-broker, is that correct?

A. That is correct.

Q. Those conditions were not acceptable, at least some of them, were they?

A. To Mr. Willis, that is right.

Q. Mr. Willis being the representative from Crest stated he could not accept those provisions?

A. That is right.

283 Q. After that had been made known to Mr. Appelbaum, you stated, I think you said to Mr. Appelbaum, "So, you think you have a binding contract and you want us to live up to it? You say you are willing to?"

And Mr. Appelbaum said, "That's it," or words to that effect.

A. That was at the end of the afternoon conference, not in the morning conference.

Q. I am saying, at the end of these conferences?

A. That is correct.

Q. Prior to that time there had been various offers made to Mr. Appelbaum, had there not?

A. There had been, I would say three offers, first, Mr. Willis' offer as to the conditions under which Mr. Appelbaum could work for him, and secondly, when Mr. Fraustro or I offered $20,000 to wash him out, you might say, and the last one of $40,000.

Q. Those two offers, that is the one made of $20,000 and the one made of $40,000 were, of course, not acceptable to Mr. Appelbaum?

A. That is correct.

The Court: A little louder, Mr. Clayton.

Mr. Clayton: Yes, sir.

By Mr. Clayton:

284 Q. So, neither of the offers which you and Mr. Fraustro made to him being acceptable to him, the provisions which he designated as those he would require before he would consider becoming a sub-broker not being acceptable to Mr. Willis, the conference terminated, did it not?

A. That is right.

Q. That is when the statement I have just related to

you was made by you and the statement in response to that made by Mr. Appelbaum?

A. That is correct. That was the last thing that was said.

Q. Then you returned to New York?

A. That is right.

Q. About the 14th of October, you made a telephone call to Mr. Appelbaum?

A. That is right.

Q. Now, during these conferences, or while in Chicago, or after you had been here, were you shown these communications that had been exchanged between Reno and the defendant?

A. I don't think I saw everything. I saw—I remember that I saw the original contract, and I saw the letter extension agreement of July, 1952, I believe it is. It
285 has been offered in evidence. Whether I saw a few more of the documents, I am not quite sure. There was a large file, and I did not try to read it all.

Q. But, before leaving the conference, I understood you to say, did I not, that you made a statement or rather, Mr. Fraustro made a statement to you concerning certain guarantees that Mr. Appelbaum was requesting, and you stated that you did not know anything about his requesting the guarantees, or words to that effect?

A. You see, throughout the conference prior to that time, Mr. Appelbaum had been talking about—

Q. Just—

A. I want to explain.

Q. If you would be kind enough, sir, I will ask you again.

A. Yes.

Q. Just before the conference broke up, or as it was breaking up, did not Mr. Fraustro say something to you about him—referring to the defendant—requesting a guarantee, and you stated that you did not know anything about a guarantee?

A. Mr. Fraustro stated it to Mr. Appelbaum. He said something like, "Henry, I understand you want guarantees."

That is when I said, "No, I don't understand it
286 that way. He is not asking for guarantees if we go ahead with the contract. He just wants us to go ahead and perform it."

A. At the time you made the telephone call to Chicago

to Mr. Appelbaum, you told him you had been in touch with the people in Mexico, did you not?

A. That is right.

Q. You made a statement to him concerning certain remittances they informed you had not been made?

A. That is right.

Q. Do I understand you correctly to say that Mr. Appelbaum told you that what assurances would he have if he remitted this money that day—referring to the people in Mexico—would live up to their end of the contract?

A. That is right.

Q. He asked you whether you would guarantee that, did he not?

A. That is right.

Q. He told you the corporation or the association being a foreign or a Mexican corporation, if remittances were made, he would have nothing that he could proceed against in the case of a breach, or they failed to live up to their contract, or words to that effect?

287 A. He may have said something along that line. I don't remember. I certainly remember he said, "What guarantees am I going to have they are going to live up to that contract?"

Q. When you said that you could not guarantee it, he then asked you whether or not you could get Nacional Financiera to guarantee it?

A. That is right.

Q. He also told you, did he not, did he not ask you, "Can you get Nacional Financiera to just send me a letter stating that they will guarantee the fulfillment of the contract?"

A. Whether he mentioned a letter or what—but at least he asked me, he said, "Will Nacional Financiera guarantee it?"

I told him, "I have not the slightest idea, but if you want me to, I will communicate it." That I would tell them.

Q. You told him you would communicate with them to see whether they would or would not, is that correct?

A. I just said that I would tell them what he wanted.

Q. Did you at any time communicate with Mr. Appelbaum and tell him what Nacional Financiera informed you as to whether they would or would not guarantee performance?

288 A. Well, Mr. Clayton, at this point I would not be able to say whether I did or I did not. I have an im-

pression that a few days later I spoke to him once more and told him they would not, because in the meantime I did hear they were not going to guarantee any such thing. It was between him and Reno, the contract, and they just expected to go along. But, I would not swear to that, that that is so that I did phone him. I'm not quite sure about that.

Q. Your impression is you did tell him later that Nacional Financiera would not guarantee it?

A. I have an impression along that line, but I am not too sure.

Q. Being the attorney for Nacional Financiera you now know they did not guarantee it, don't you?

A. I believe that is correct.

Q. That was a few days after October 14th?

A. Yes.

Q. 1953?

A. That is right.

Mr. Clayton: No further cross.

Mr. Kohn: One question, if the Court please.

The Court: Very well.

289 *Redirect Examination by Mr. Kohn.*

Q. Mr. Collenburg, in response to a question asked by Mr. Clayton, you stated you came to Chicago expecting there would be some papers that would have to be signed, is that correct?

A. That is right.

Q. Would you state what those papers were?

A. Well, I understood—

Mr. Clayton: I will object to that.

The Court: I cannot hear you.

Mr. Clayton: I will object to that, your Honor.

Mr. Kohn: If the Court please, in response to a question asked by Mr. Clayton as to why he came to Chicago, he replied that certain papers that might have to be signed—

The Court. I don't think I will open that up.

I will sustain that objection.

Mr. Kohn: No further questions.

The Court: That is all, so you may step down.

(Witness excused.)

290 Mr. Kohn: I have five letters or reports to admit, and then that will conclude the plaintiff's main case.

The Court: Very well. How are they marked?

Mr. Kohn: They are marked Plaintiff's Exhibit 22 for identification, letter from the defendant addressed to Mr. Pinson.

Another one bearing identification number 23, similarly from the same party addressed to Mr. Pinson dated July 3, 1953.

A similar letter dated August 7, 1953, marked Plaintiff's Exhibit 24.

Another similar letter dated June 12, 1953, marked Plaintiff's Exhibit 25 for identification.

I now offer these in evidence, and I understand there are no objections.

The Court: They have been submitted in accordance with my pre-trial order?

Mr. Kohn: No, they were just submitted today.

The Court: Is there any objection?

Mr. Sprecher: No objection.

The Court: Very well, Plaintiff's Exhibits 22, 23, 24 and 25 for identification are received in evidence.

Mr. Kohn: Thank you.

(Whereupon said documents marked PLAINTIFF'S EXHIBITS 22, 23, 24 and 25 for identification were 291 received into evidence.)

Mr. Kohn: You have copies of these?

Mr. Sprecher: You had better give us some. I cannot locate them.

The Court: Do you desire to read them to the Jury?

Mr. Kohn: No.

The Court: Very well.

Is there anything further in behalf of the plaintiff?

Mr. Kohn: That is all at this time.

The Court: The plaintiff rests.

(Whereupon the plaintiff rested its case in chief.)

The Court: Defendant's case.

Whereupon the defendant, to maintain the issues on its part, introduced the following evidence, to-wit:

The Court: Mr. Witness, face the Clerk and be sworn.

HENRY APPELBAUM, called as a witness in behalf of the defendant, having been first duly sworn, was examined and testified as follows:

292 *Direct Examination by Mr. Clayton.*

Q. Your name, sir, is what?
A. Henry Appelbaum.
Q. You live where, sir?
A. 849 Sheridan Road, Winnetka, Illinois.
Q. Your business or occupation is what?
A. Frozen Foods.
Q. Under what firm name do you operate?
A. Penguin Frozen Foods.
Q. The office of Penguin Frozen Foods is located where?
A. 120 South LaSalle Street.
Q. You have been operating Penguin Frozen Foods for approximately how long?
A. The last five years.
Q. Prior to that time, what was your business or occupation?
A. I was vice-president and director of Goldblatt Brothers.
Q. How long were you vice-president and director of Goldblatt Brothers?
A. About twenty years.
Q. Were you connected with or operate any other business?
A. Yes, I was part owner of the Morris Fisheries.
293 Q. Any other business?
A. The Miller Connell Venetian Blinds.
Q. Will you explain to the Court and Jury, Mr. Appelbaum, the nature of the business of Penguin Frozen Foods?
A. It was to receive shrimp from—it was organized to receive shrimp from Reno Company in Mexico and distribute them in the United States.
Q. Now, about when was it that you first had any dealings with Reno?
A. When I was at Morris Fisheries. Mr. Alcaldi sold me three cars of shrimp.
Q. Before entering into the contract with Reno, did you know or did you have occasion to meet Mr. Pinson?
A. Yes, I did.

Q. When was that?
A. That was about June of 1950.
Q. Where did that meeting take place?
A. In my office at Goldblatt's.
Q. What was the nature of that meeting?
A. He wanted to know if I was interested in taking over the distribution of the shrimp in the United States, and I told him I was. He wanted me to advance him $150,000 for the contract.
294 Q. Did you advance him $150,000 for the contract?
A. No, I did not.
The Court: What?
The Witness: I did not.

By Mr. Clayton:

Q. When you said that he was interested in you distributing his shrimp, by that, whose shrimp was he referring to?
A. Reno.
Q. Reno?
A. Refrigeradora Del Noroeste.
Q. The plaintiff in this case?
A. Known as Reno.
Q. After you had this conference with Mr. Pinson as you have just stated in Chicago, did you later have occasion to enter into a contract with Reno for the distribution of its shrimp in the United States?
A. I did.
Q. I will show you a document marked Plaintiff's Exhibit 1, it purporting to be an agreement that was entered into on the 19th day of October, 1950, between Refrigeradora Del Noroeste and Penguin Frozen Foods, Inc., and ask you to look at that and state whether or not you have seen that document before?
A. I did.
295 Q. Is that the document which was—
I will ask you to look at the last page and state whether or not you signed that document on behalf of Penguin Frozen Foods?
A. I did.
Q. Was that the contract which was entered into between yourself and the plaintiff in this case of the distribution of plaintiff's shrimp in the United States?
A. It was.
Q. Now, after you had entered into the contract with

the plaintiff for the distribution of its shrimp, did you distribute this shrimp within the United States?

A. I did.

Q. Were you the sole distributor?

A. Yes, sir.

Q. After the contract was entered into on October 15, 1950, did you subsequently enter into another agreement with the plaintiff?

A. Two years later.

Q. Approximately what date was that, if you recall?

A. That was, I think, in June, 1952.

Q. I show you, Mr. Appelbaum, a document marked Plaintiff's Exhibit 3, and ask you whether or not you have seen that document before?

296 A. I did.

Q. Was that the document which has been heretofore referred to as the extension agreement of the contract which has been shown to you and marked Plaintiff's Exhibit 1?

A. It is.

Q. By the way, under the terms of the original contract with the plaintiff, was there any provision made with respect to the method or the manner by which payment would be made for the shrimp which you received from them?

A. There was.

Q. Will you tell the Court and Jury what that agreement was?

Mr. Kohn: If the Court please, I will object to that question on the ground that the contract speaks for itself.

The Court: The objection is sustained.

I might say, Mr. Clayton, in sustaining that objection, if you desire the same privilege as I gave plaintiff of reading from any documen in evidence or any part thereof while you are examining a witness, you may have that privilege. If you care to read the particular page at

297 this time, the document is in evidence, and you may read it.

Mr. Clayton: All right, with the permission of the Court, would you permit Mr.—

The Court: You can use another voice, too.

Mr. Karaba: (Reading) 11(b)

"Buyer agrees to deliver to Seller on or before the 15th day of each month during the term of this agreement and on or before the 15th day of September, 195 , a report in

writing, verified by an officer of Buyer, setting forth (i) the name and address of each person, firm or corporation to whom Buyer has, during the preceding month or lesser accounting period, if the period covered by such account be less than one month, re-sold shrimp purchased by it hereunder; (ii) the date of each such sale; (iii) the sale price at which such shrimp were sold; (iv) the number of pounds of shrimp sold to each purchaser; (v) the size (and any other grade or classification) of shrimp in each sale; and (vi) the identification of the shipment or shipments by car number, invoice number (and/or other means of identification) involved in each sale. Si-
298 multaneously with the delivery of each such report referred to in this sub-paragraph Buyer agrees to pay to Seller the balance due from Buyer to Seller on all sales made by Buyer, as disclosed by such report. The amount of such payment shall be arrived at by adding to the purchase price (i. e., 93% of the price at which such shrimp is sold by Buyer) all amounts advanced by Seller as agent for Buyer, as provided in Section 6 of this agreement, which have been billed by Seller to Buyer, and deducting from the aggregate of such amount the following items with respect to the matters covered by such report:

"I. The amount previously paid by Buyer to Seller, on account of the shrimp re-sold by Buyer, as disclosed by such report.

"II. The aggregate amount of all freight charges, icing expense, handling charges, insurance premiums, paid for keeping shrimp insured, storage charges, and any and all other transportation charges, in connection with
299 the transportation of shrimp, paid or incurred by Buyer.

"III. The amount deducted by Buyer pursuant to the provisions of Section 14 of this agreement."

The Court: Proceed, Mr. Clayton.

By Mr. Clayton:

Q. Now, so it as set forth in the document just read the provisions with respect to how the payments were to be made, is that correct?

A. Yes.

Q. Now, in the extension agreement which I have just shown to you that extended the original contract, with certain exceptions, for what period of time?

A. Two years.

Q. The two-year period would end when, if you recall?

A. In August, the 15th of August, I think, 1954.

300 Q. Now, operating under both the original agreement and the extension agreement, will you tell the court and jury or give them a general idea as to the extent of the business which you developed here in the United States with respect to the distribution of shrimp?

A. We had sold the first year, I think, about two million three hundred thousand pounds of shrimp.

Q. Will you tell the Court and jury the areas covered by your sales?

A. All over the United States and Canada.

Q. In any particular city did you sell to a particular Buyer, or did you sell in the open market?

A. No, we sold to one. In large cities we had two, but mostly the cities we had one particular Buyer we gave our shrimp to, that we sold them to.

Q. Now, with respect to your dealings with the plaintiff, the contract provided that a certain per cent of the price that you sold the shrimp for would be remitted to the plaintiff, is that correct?

A. That is correct.

Q. And the extension agreement when you were operating under that, when the cars were sent to you, when would you remit to the plaintiff for those cars?

A. Each car was sent on a trust receipt and we
301 were to remit for those, for each car individually, when that particular car was all sold out.

Mr. Kohn: If the Court please, I move to strike the answer, and I object to the question. The question was not exactly indicative of the answer following, so I object on the ground it is at variance with the written terms of the contract which provided for monthly payments as reports were made. That is the contract that was just read.

The Court: The objection is sustained. The answer may be stricken.

By Mr. Clayton:

Q. With respect to the extension agreement, was there a different method of payment than was provided in the original contract?

Mr. Kohn: If the Court please, the extension agreement has been offered in evidence, and speaks for itself.

The Court: It has been received.

Mr. Kohn: It has been received. I want to make the same objections.

The Court: I make the same ruling.

You may read from them if you care to.

302 By Mr. Clayton:

Q. Now, Mr. Appelbaum, were you still operating under the extension agreement in February of 1953?

A. We were.

Q. In February of 1953, did you receive any communications from the plaintiff?

A. The latter part of February, we received a telegram cancelling the contract.

Mr. Clayton: Your Honor, as you know, the plaintiff is desirous of having a witness—

Mr. Kohn: That is not right.

Mr. Clayton: The plaintiffs are desirous of us calling a person out of turn, so that he might be permitted to leave.

The Court: Go ahead. He wishes to go back to his work?

Mr. Clayton: I was just informed that he has arrived.

With the Court's permission, we will interrupt the testimony of Mr. Appelbaum at this time, and let Mr. Willis take the stand.

The Court: I think that is considerate of you.

Mr. Kohn: Mr. Willis appreciates it. He
303 asked me to ask for him.

The Court: I will permit you to do that, if you will take your chair. Then Mr. Willis can testify.

We will hear the rest of Mr. Appelbaum's testimony, ladies and gentlemen, after we hear from Mr. Willis.

By agreement of counsel, we are hearing from him now, so that he may return to his duties in California.

(Witness temporarily excused.)

Mr. Clayton: We are calling Mr. Willis, your Honor, as an adverse witness.

The Court: On that I want to hear counsel. Do you consent that he is an adverse witness?

Mr. Kohn: If the Court please—

The Court: The Rule requires he be an officer and agent of the adverse party in order to be an adverse witness, has to be an adverse party. I don't think that was raised before.

What you want is leave to cross examine him. Perhaps counsel will stipulate to that.

Is that what you want?

Mr. Clayton: That is correct.

304 The Court: You don't want to be bound by his testimony?

Mr. Clayton: That is right.

The Court: You want leave to cross-examine him, rather than direct examination?

Mr. Clayton: Yes, sir.

The Court: Do you consent to that?

Mr. Kohn: Well—

The Court: You might as well, because I am going to grant it anyway.

Mr. Kohn: Yes, that made it very easy for me, Judge.

The Court: Yes, I thought it would help you make up your mind.

Leave to proceed by way of cross-examination is granted Mr. Clayton.

JOHN W. WILLIS, called as an adverse witness by the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Clayton.

Q. Your name, sir, is what?

A. John W. Willis.

Q. You live where, sir?

A. La Jolla, California.

Q. Your business or occupation is what?

305 A. President of Crest Importing Company.

Q. Crest Importing Company is what kind of an organization?

A. It is a California corporation.

The Court: Is that Crest Importing?

The Witness: Yes, sir.

The Court: Go ahead.

By Mr. Clayton:

Q. What business is it engaged in?

A. In the Importing of Frozen shrimp from the West Coast of Mexico.

Q. Do you know Mr. Willis, when Crest Importing Company was formed?

A. In June, 1953.

Q. Were you instrumental in the formation of that Company?

A. Yes, sir.

Q. When, if you recall, were negotiations first started toward the formation of the Crest Importing Company?

A. March, 1953.

Q. And the purpose of the formation of that Company was what, sir?

A. That I handle frozen shrimp.

Q. Were you connected with that Company at or 306 after its formation?

A. I am President of it now. The Company was not formed then. I was not connected with it.

Q. Then in the formation of the Company, you were instrumental in helping to form it, were you not?

A. Yes, I was.

Q. In forming the Company, did you have occasion to meet with one Pedro Pinson?

A. Yes, sir.

Q. Do you recall your first meeting with him with respect to the formation of Crest Importing Company?

A. It was in Mexico City in March, 1953.

The Court: What year?

The Witness: March, 1953.

By Mr. Clayton:

Q. Prior to March of 1953, had you not had a meeting with Mr. Pinson with respect to the formation of this Company?

A. No, not Crest as such. I have discussed with him in Dallas, Texas, I believe, and an idea such as this.

Q. When did that discussion take place?

A. I believe it was in 1951, probably October, November of 1951. Possibly 1950.

307 Q. The discussion that you had with Mr. Pinson in Dallas, Texas, of 1950 and 1951 was with respect to forming a Company for the distribution of shrimp that would be imported from Mexico, was it not?

A. And including domestic production.

Q. The particular name had not been decided upon?

A. No, sir.

Q. Did you have another conversation with Mr. Pinson either in Boston or Washington subsequent to your meeting him in Dallas?

A. No, not in Boston. He was not present at that conference, I don't believe. I had a discussion with him in April, 1953.

308 Q. And prior to April of 1953, didn't you have a discussion with Mr. Pinson concerning the formation of an Importing Company?

A. Yes, sir, in March, 1953, in Mexico City.

Q. I mean in either Boston or Washington?

A. Mr. Pinson wasn't present in Boston and the meeting in Washington came after the March meeting.

Q. The March meeting of what year?

A. 1953.

Q. Did you have a meeting with persons concerning the formation of such a Company as early as 1952 in either Washington or Boston?

A. There was a discussion at the National Fisheries Institute Convention in Boston and I believe the year was either 1950 or 1951.

Q. At that meeting your recollection is that Mr. Pinson was not present?

A. That is correct.

Q. Now, as a result of these meetings in June of 1953, Crest was formally incorporated, was it not?

A. I would say it was the result of a meeting in March of 1953.

Q. And when it was incorporated in June of 1953, do you now recall who the officers were at that time?

309 A. At that time?

Q. Yes, sir.

A. Myself, and when it was originally incorporated it was Mr. J. A. Donnelley. He was the attorney that handled the incorporation. At the first meeting I was elected President and Treasurer. Mr. Pinson was Vice President. Mr. Donnelley was Secretary and then resigned and then Mr. Hecht became Secretary.

Q. Subsequent to the formation and the election of the persons to the respective offices that you just mentioned, a number of those officials resigned, did they not?

A. I am not certain. I understand, yes.

Q. Did the officials that were elected in the inception continue to function for the first year?

A. Yes, sir.

Q. And the second year did they resign?

A. No. New officers were elected.

Q. What is that, sir?

A. New officers were elected.

Q. Who were the new officers that were elected and when?

A. There was no change with the exception of the Vice President. His name is Hernando DeCima.

310 Q. Now, the Crest Importing Company entered into a contract with E. A., did it not?

A. That is right.

Q. Do you recall when that contract was entered into?

A. October 3, 1953, I believe.

Q. Now, October 3, 1953?

A. That is the date on the contract. It was discussed prior to that but there was an exchange of correspondence prior to the contract.

Q. Prior to October 3, 1953 there had been a meeting at which time the terms of the contract were decided upon, was it not, sir?

A. Yes. That is correct.

Q. And after that meeting the terms of that contract was written in the Spanish language, was it not?

A. I believe it was, sir.

Q. And subsequent to that time, did not you cause to be sent to Mr. Ostos a copy of what you summarized as the terms of the contract which had before that time been reduced to writing in the Spanish language?

A. I do not believe I sent it to Mr. Ostos.

Q. To whom did you send it?

A. To Exportadores Associados in Mexico City.

Q. Who connected with E. A., did you send the

311 contract or direct the attention to?

A. Senor Lepcowitz.

Q. When you entered into the contract with E. A., and when I say "you" I mean Crest Importing Company?

A. Yes.

Q. That contract provided that E. A., would sell all of their shrimp to Crest, did it not?

A. All of its shrimp.

Q. Yes, all of its shrimp to Crest?

A. Yes.

Q. Now, were you familiar with the Exportadores Associados in this operation?

A. Yes, I think so.

Q. Now, referring to it as E. A., it had an agreement or a contract with the various shrimp producers on the West Coast of Mexico, did it not?

A. Yes, sir.

Q. And the various shrimp producers on the West Coast of Mexico were connected with E. A., were they not?

A. That is correct.

Q. And did they own stock in the company or just how were they connected?

A. It is a form of a Mexican corporation that I believe is called Society Anonymous and we do not believe the
312 ownership of those shares are of public record.

Q. That is the reason they refer to it with the letters "S. A." afterwards, is it not?

A. I believe so.

Q. And the various fish producers were members of the E. A.?

A. Yes.

Q. And they held stock in E. A., did they not?

A. I don't know that for a fact but I believe they did.

Q. Now, before Crest Importing Company was formed, did you have any dealings with Reno?

A. No, sir.

Q. At the time that this contract that was prepared, the terms of which were reduced to writing in the Spanish language was entered into, do you now know the names of the various persons that were to be parties to that contract?

A. Well, we were to ship their production to E. A.

Q. Yes?

A. Yes, sir, I do.

Q. And was Reno one of those?

A. Yes, sir.

313 Q. And in this document that you sent to E. A., that document contained the name of Reno as being one of the firms that would ship its supply to E. A., is that correct?

A. It is not correct.

The Court: I can't hear you.

A. It is not correct, and you have a copy of the contract.

By Mr. Clayton:

Q. But E. A. was mentioned in the contract that was reduced to writing in the Spanish language?

A. E. A. was, yes, not Reno.

Q. That is what I say. I think you stated that you sent a letter to E. A. in which you embodied in your letter a resume of the abbreviations of that contract, did you not?

A. Yes, sir.

Q. Now, in your letter to E. A., did you include the name of Reno?

A. No, sir.

Q. Now, can you tell the Jury approximately when you sent that letter to E. A.?

A. I believe the final draft of the contract after it had been studied by American attorneys was sent in March 314 of 1954.

Q. That is the final draft?

A. Yes, sir.

Q. Do you recall now when you sent the first one?

A. No. I am sorry. I don't.

Mr. Kohn: If the Court please, I would like to suggest to Mr. Clayton that in view of the fact he makes reference to numerous documents, it would expedite the matter if he could refer to specific ones and identify them so we would know what document he is talking about. There are so many involved in this case.

Mr. Clayton: I will comply with his request, your Honor.

The Court: Very well.

By Mr. Clayton;

Q. I will show, Mr. Willis—

Mr. Clayton: Mark these as Defendant's Exhibits 7, 8, 9, 10, 11 and 12 for identification.

(Said documents marked as requested.)

By Mr. Clayton:

Q. Before showing these documents to you, Mr. Willis, I asked you about the officers and so forth of the Crest 315 Importing Company and you gave us the names of some.

Now, was Mr. Pinson connected with Crest Importing Company?

A. I believe I answered that, Mr. Clayton, by saying he was elected vice-president.

Q. And was he subsequently made chairman of the board of directors?

A. No. We have no such thing as chairman of the board. That is why the title was changed to vice-president.

Q. Made chairman of the board, that position, the name has been changed to vice-president, is that correct?

A. No. No, it is not correct. We never had a chairman of the board.

Q. Crest never had an office known as chairman of the board?

A. No, sir, not to my knowledge.
Q. Did you at any time attend any of the meetings of the—
A. I believe I attended all of them, Mr. Clayton.
Q. Did you attend any meeting of the board of directors?
A. Yes.
Mr. Kohn: If the Court please, I would like to make a suggestion to Mr. Clayton. We have here in the court
316 pursuant to the subpoena on Mr. Willis the corporate minutes and they would certainly govern; if Mr. Clayton wants to read any of the minutes which are in the record, he can. I am sure we would have no objection.
The Court: Very well

By Mr. Clayton:

Q. I will show you, without identifying it other than minutes of the second meeting of the directors of Crest Importing Company, Inc., and ask you to state whether or not these documents appear to be the correct minutes of the board? Will you look at them?
A. Yes, they do.
Q. Now—
A. I am very sorry. That shows I have not read my own minutes.
Q. Now, with respect to that, refreshing your memory, it states that the Secretary announced that in his opinion it would be advisable for the directors to elect an officer to be known as chairman of the board of directors who would preside at all meetings of the board. After discussion Pedro L. Pinson was nominated and unanimously elected chairman of the board of directors.
A. Yes.
Q. With that having been called to your attention,
317 you now state that there was an office known as chairman of the board?
A. Yes, sir, I have learned something.
Q. Yes, and Mr. Pinson was elected unanimously as chairman of the board of directors, was he not?
A. Yes, sir.
Q. Now, do you recall when that took place?
A. The minutes that you showed me, I believe, are dated August 3, 1953.
Q. August 3, 1953?
A. Yes.

Q. Now, this contract—I will withdraw that. Now I show you, Mr. Willis, a document referred to as Defendant's Exhibit 7 for identification, purporting to be a letter on the stationery of Crest Importing Company, signed by you, and I will ask to look at the top letter and the documents attached thereto, and state whether or not that letter was signed by and the documents attached thereto were sent by you to the addressee named therein?

A. Yes. I have signed this letter.

Mr. Kohn: May I see it?

Mr. Clayton: Yes.

Mr. Kohn: If the Court please, I expect there will
318 be a number of documents that will be introduced and offered in evidence along the same line as this document. I would like to discuss the point as a legal question. It may take two or three minutes.

The Court: When and if they are offered, I will be very glad to hear you. As yet he has not offered them.

Mr. Kohn: That is right.

By Mr. Clayton:

Q. Now, after that document, Defendant's Exhibit 7 was sent, I show you Defendant's Exhibit 8 and ask you to look at what purports to be a letter from Congeladora del Pacifico, addressed to Crest Importing Company, and state whether or not you have seen the letter and the attached documents?

A. Yes, sir, I have.

Q. I show you Defendant's Exhibit 9, purporting to be a letter on the stationery of Wilbur Ellis Company, addressed to Sr. Isaac Coppel, and I will ask you whether or not you signed and sent that letter?

A. Yes, sir, I did.

The Court: What is the number?

Mr. Kohn: 9.

The Court: 9, very well.

319 By Mr. Clayton:

Q. I show you Defendant's Exhibit 10 for identification and ask you to look at that and state whether or not you signed and sent that letter?

A. Yes, sir, I did.

Q. I show you Defendant's Exhibit 11 for identification, it being a document consisting, or a photostatic copy of a document consisting of three pages, and ask you whether or not you have seen that document before?

A. Yes, sir, I have.

Q. And that document was obtained from your files prior to your appearing in court, is that correct, the original of that document?

A. Yes. I believe we had photostats made of these. I surrendered them.

Q. To your knowledge, did you sign this document?

A. No, sir.

Q. I show you Defendant's Exhibit 12 for identification and ask you, or consisting of two pages, photostat of a letter dated September 11, 1953, and ask you to look at that and state whether or not you have seen that document before?

A. Yes, I have.

320 Q. That document, do you know who sent that document to the addressee?

A. I did. I signed it.

Q. You signed it. Now, with respect to the document which you first sent to E. A., I understood you to say that in it to your recollection the name of Reno was not included as being a member of E. A., is that correct?

A. Are we referring to the contract?

Q. Yes.

A. Yes.

Q. Now, the final draft you say was executed sometime in 1954, is that correct?

A. I don't—

Q. The final draft of a contract was signed sometime in '54?

A. Well, it was dated back to October 3, 1953.

Q. It was dated back to October 3, 1953?

A. Yes.

Q. But it was actually signed in '54, was it not?

A. I believe that is correct.

Q. Now, at the time the document was signed even though dated back to October, 1953, a dispute had arisen between Reno and the defendant in this case, had it not, with respect to this contract with Reno?

A. Yes.

321 Q. And with respect to the officials of E. A., you knew, did you not, and you know that Mr. Pinson is also connected with it?

A. Yes, sir.

Q. With respect to the officials or operators of Reno, you know that Mr. Pinson was the general manager of Reno?

A. Yes.

Q. And he was the general manager at the time of these negotiations of Crest with E. A.?

A. That is correct.

Q. And he was the general manager at the time that E. A., had entered into the contract with the various shrimp producers on the West Coast of Mexico, is that correct?

A. That is correct.

Q. With respect to the—

Mr. Clayton: Will you mark this as defendant's Exhibit No. 13 for identification?

(Said document was marked as requested.)

By Mr. Clayton:

Q. I show you defendant's Exhibit 13 for identification, consisting of a letter on the stationery of Crest Importing Company and two documents attached thereto and ask you to look at that and state whether or not you
322 have seen those documents and the letter before?

A. Yes, I have. I turned these over to the Court.

Q. Now, getting back to the organization of Crest.

The Court: Has that been marked?

Mr. Clayton: As defendant's Exhibit 13.

The Court: Very well.

By Mr. Clayton:

Q. Under the contract that you had with the E. A., it was to ship to Crest all of its shrimp, is that correct?

The Court: You must answer for the record.

By the Witness:

A. Yes.

By Mr. Clayton:

Q. Do I understand correctly that E. A., in turn had a contract with the various shrimp producers on the West Coast of Mexico where they were to sell to E. A., all of their shrimp?

A. Yes, sir.

Q. Now, when you came to Chicago in September of 1953, you came here as a representative of Crest Importing Company, did you not?

A. That is correct.

Q. Now, prior to your coming to Chicago, had you made arrangements or had you attempted to make
323 arrangements for the distribution of shrimp in the United States to be imported from Mexico?

A. Yes.

Q. And had you contacted any persons or firms with the view of their being distributors here in the United States?

A. Yes, as distributors and brokers, both.

Q. You had contacted persons or firms with a view of having them being sub-brokers for Crest Importing Company, had you not?

A. Yes.

Q. And was your idea, was it not, that you could best distribute the shrimp by having sub-brokers for Crest rather than sales representatives for Crest, is that correct?

A. We consider a broker the same as a sales representative.

Q. Who would receive a certain percentage, is that correct?

A. Yes, sir.

Q. Had Crest when you came to Chicago in September, 1953, opened an office for the doing of business?

A. Yes.

Q. And where was that office opened?

A. 1521 Fourth Avenue, San Diego.

324 Q. When was it opened?

A. August 15, 1953.

Q. And as of September when you came to Chicago, approximately how many employees did you have in your office of Crest Importing Company?

A. I believe we had four at the time.

325 Q. Prior to coming to Chicago, had you talked with anyone about the contract which Reno had for the distribution of shrimp in the United States with the defendant?

A. I am sorry. I didn't quite get all that—the end of your question.

Q. Before coming to Chicago, had you, at any time discussed with any person the contract which Reno had for the distribution of its shrimp in the United States with the defendant?

A. Yes.

Q. Had you discussed that contract with Mr. Pinson?

A. Yes.

Q. Can you tell the Court and Jury when you first discussed that contract with Mr. Pinson?

A. I don't recall when. It was shortly before I came to Chicago.

Q. Had you discussed that contract with any other person other than Mr. Pinson?

A. Yes, I believe prior to coming to Chicago, I discussed it with Senor Fraustro.

Q. That was the same Senor Fraustro that was a witness here today, is that correct?

A. Yes.

Q. Did you discuss the contract with Senor Ostes?

326 A. No.

Q. Did you ever communicate with Mr. Ostes in which you made reference to the contract between Reno and the defendant?

A. Yes.

Q. Approximately when was that?

A. I wrote to him early in September. I believe it was under date of September 11th.

Q. Was that the first communication that you had had with him pertaining to, or in which was mentioned the contract between the plaintiff and the defendant?

A. I believe so.

Q. As a result of conversations which you had had with Senor Fraustro and Senor Pinson, was it not your impression that the contract between the plaintiff and the defendant had been terminated by the plaintiff?

A. No, no. It was prior to then, but when I discussed it with them in September, it looked as if a different implication had been put on the contract.

Q. When did you first have the impression or understand that the contract between the plaintiff and the defendant had been terminated?

A. When it had been terminated?

Q. Yes, sir. When did you first acquire knowledge 327 of that fact?

A. Well, when Crest was formed; when the organization was formed, I was—

Q. About when was that?

A. In March, 1953. It was when it was discussed. I was under the impression there was no existing contract between Reno and Penguin.

Q. You had that understanding before Crest was incorporated in June of 1953, didn't you?

A. Yes, sir.

Q. You went about the work of incorporating it based upon the opinion that you had that no contract existed, didn't you?

A. No, sir.
Q. You did believe that a contract existed between them when you were incorporating?
A. No, sir.
Q. When you say "no, sir," what do you mean, sir?
A. I mean there were many other producers involved in this idea.
Q. I am not asking you that. I mean at the time you were about, went about incorporating Crest, you were of the opinion that no contract existed between Reno and the defendant?
328 A. That is correct.
Q. You had knowledge of the amount of production of Reno, didn't you?
A. Yes.
Q. You had that in mind in—you thought upon the formation of this company you would be able to get Reno production, along with the others, did you not, sir?
A. Yes.
Q. That idea—that is, that there was no contract—existed up to and until when, sir?
A. Until Mr. Collenburg told me that.
Q. When was that?
A. That was in September, 1953.
Q. When Mr. Collenburg told you in September of 1953 that in his opinion there was a valid existing contract between Reno and the defendant, you were disappointed, to say the least, weren't you?
A. I was disappointed.
Q. Using your terminology, you referred to it as being "catastrophic," did you not, sir?
A. I did in a deposition, yes, sir.
Q. Was it in communications which you sent to, I think Mr. Ostes—state that you certainly thought it was catastrophic if this contract was still in existence?
329 A. I don't remember the use of the word, but if it is in the letter, I agree with it.
The Court: Before we get further into this catastrophe, let us take a ten minute recess.

(Whereupon there was a ten-minute recess.)

The Court: Bring in the jury.
The witness will resume the stand.
You may now lead us further into this catastrophic abyss.

By Mr. Clayton:

Q. Mr. Willis, when you were told, I think, or when you were informed by Mr. Collenburg that the contract between Reno and the defendant was still in existence, I think you stated, that you referred to it that it was catastrophic, is that correct?

A. Yes, in so far as Crest was concerned.

Q. That was the concern that you were connected with, isn't that correct?

A. Yes.

Q. Now, you were desirous of having the contract, if it was in existence, terminated, weren't you, sir?

A. Yes.

Q. You were willing to lend whatever assistance you could to the plaintiff to obtain its cancellation, weren't
330 you?

A. I was.

Q. In the letter which you wrote to Mr. Ostes on September 11, 1953, before coming to Chicago, you told him that if the contract was in existence you felt it should be terminated, and that you would aid and assist him in any way that you could to so do, did you not, or words to that effect?

A. Yes, that's correct.

Q. You understood, did you not, or you believed, did you not, that with the existence of that contract, Crest wouldn't be permitted to reap the profits that you had anticipated, is that correct?

A. I am sorry. I don't understand the question.

Q. You felt that it was not to the best interest of Crest to have a contract between Reno and the defendant, is that correct?

A. No.

Mr. Kohn: If the Court please, the question was "you felt that it would—" The question is asking for his feeling. That is an unexpressed element not binding on the plaintiff.

The Court: I think, to shorten it up, I will let him answer. We could get it out in a different way, but it
331 will take us another fifteen minutes.

Go ahead and answer it.

Mr. Kohn: I withdraw the objection.

By the Witness:

A. No. I felt it was not to Crest's advantage.

332 By Mr. Clayton:

Q. Referring to the chart there, Mr. Willis, and the space down here marked "Crest Importing Company, Inc.," that would be your concern, does this chart correctly portray the set-up that existed between the shrimp producers of the West Coast of Mexico with Exportadores Associados and also with your company, with the exception, of course, of the directors' names that Mr. Fraustro—

Mr. Kohn: DeCima.

By Mr. Clayton:

Q. (Continuing.) —Mr. DeCima, there should be a "U" here, and a "S" there?

A. Mr. Fraustro is not a director. I don't know anybody by the name of Foresto Horedo.

Q. Well, I think to enlighten you, when you were not in the courtroom, Mr. Fraustro corrected that name. There was a misspelling when the deposition was taken.

Mr. Kohn: Mr. Pinson.

Mr. Clayton: That is Mr. Pinson.

The Court: What do you want him to say about this?

Mr. Clayton: Whether that correctly portrays the set-up that existed between the—

333 The Court: Do you know whether it does or not? Can you stipulate to it, so we can get it out of here? I have not even seen it yet.

Turn it around.

The Witness: It is quite nice art work, but, the chart is wrong.

The Court: The chart is wrong.

The Witness: It is pretty, but we did not have a contract with de Salina Cruz.

By Mr. Clayton:

Q. With the exception of possibly the names that appear thereon not being the persons you had contracts with, the structural set-ups that the plaintiff could have contracts with would run about as that is drawn, is that correct?

A. No, sir.

Q. In other words, the shrimp producers had an agreement with E.A.; E.A. had an agreement with Crest to sell the shrimp to it?

A. No, sir, your chart is wrong.

Q. In other words, these shrimp producers do not have an agreement to sell to E.A.?

334 A. No.

Q. What did they have?

A. Congeladora, de Salina Cruz, at the time of the organization—

Q. I think you misunderstood me. I mean, with the exception of the names that appear thereon. Can you put it down as the shrimp producers had a contract with E.A. and that was to sell E.A. the shrimp that they obtained, isn't that correct?

A. That is correct.

Q. And then E.A. had a contract with your company to sell your company the shrimp which it had, isn't that correct?

A. Correct.

Q. You had a contract, also, with E.A. that you would purchase all shrimp that it sold you and you would distribute it exclusively in the United States and the Dominion of Canada?

A. We don't consider ourselves as distributors. We are importers.

Q. You are importers?

A. Yes, sir.

Q. You would obtain the sub-brokers, is that correct?

A. Sub-brokers and buyers.

335 Q. Do you, Mr. Willis, know when the first shipment from Reno to Crest was made?

A. There was never a shipment made from Reno to Crest.

Q. When was the first shipment from Reno to E.A.?

A. October 20th.

Q. October 20th?

The Court: I did not hear it.

Would you please read the last question to me, Miss Reporter?

(Question read.)

The Court: That was October what?

The Witness: October 20, 1953.

By Mr. Clayton:

Q. It was not October 16th?

A. No, no.

Q. At a deposition given, did you not state that this shipment was October 16th?

A. I did, and before signing the deposition I corrected that statement—

Q. So you made—
A. (Continuing.) —in ink on the copy that you have.
Q. So, you now say—the first shipment was October 20th?
A. I do.
Q. Now, with respect to—
336 Mr. Clayton: Will you kindly mark these documents Defendant's Exhibits 14 through 33?
(Documents so marked.)

By Mr. Clayton:

Q. I show you, Mr. Willis, documents marked Defendant's Exhibits 14 through 33, and ask you to look at them, if you will, sir, and say whether or not you have seen those documents before?

Mr. Kohn: Mr. Clayton, I don't believe I have seen those. At least, not today. I don't know what they are. Have you copies for me?

By Mr. Clayton:

Q. As you are looking at them, Mr. Willis, will you look at them with a view of being able to tell after you have completed—

The Court: Louder, I do not hear you.

By Mr. Clayton:

Q. Will you look at them with the view of being able to state after you have completed them whether or not you received those that are addressed to you or sent those that bear your name?

A. Yes, I will.

The Court: Mr. Clayton, are these documents that were just delivered pursuant to my subpoena duces tecum?

337 Mr. Kohn: Yes, sir.

The Court: Otherwise, I would insist on complying with my pre-trial order.

Mr. Kohn: Yes, sir. They only got them a few days ago.

The Court: If there are any more, exhibit them over the evening recess, so we do not have to delay in court tomorrow.

Mr. Clayton: Yes, sir.

Mr. Kohn: To save time of the Court and Mr. Clayton, I will admit authenticity, but I want to reserve my right to object to them on other grounds.

The Court: All right. Let us get on with it.

By Mr. Clayton:

Q. In August of 1953, did you attend a meeting at the Bank of America in San Francisco which also was attended by officers of the bank and yourself and others with respect to financing Crest Importing Company?

A. Yes, I did.

Q. To your knowledge, was Mr. Pinson present?

A. Yes, he was.

338 Q. Was Mr. Fraustro there at the time?

A. Yes, he was.

Mr. Kohn: Where is this, Mr. Clayton?

Mr. Clayton: In San Francisco in July or August of 1953.

The Witness: It was August.

Mr. Clayton: August?

The Witness: Yes.

Mr. Clayton: Of 1953 at the Bank of America. That is all.

Cross-Examination by Mr. Kohn.

Q. Mr. Willis, were you the one that took the initiative in this new method of importing Mexican West Coast shrimp to the United States?

A. No, sir.

Q. Whose idea was it?

A. I believe it originated with Pedro Pinson and Isaac Coppel.

Q. That is I-s-a-a-c C-o-p-p-e-l?

A. Yes.

Q. You were the moving force, were you not, that brought the parties together, is that correct?

339 Mr. Clayton: I object to that. He said he was not.

Mr. Kohn: That brought the parties together.

By Mr. Kohn:

Q. The moving force that brought the parties together?

A. No, I would not say I was. They approached me and asked me if I would take the job.

Q. Whom did you contact?

A. I told them I would consider it and talk with the people who employed me at that time, and then I would give them an answer.

Q. What was your firm at that time?

A. Wilbur Ellis Company.

Q. Will you explain the nature of their business?
A. They are a large importing and exporting firm, and they deal in bulk commodities. They are brokers, domestic sales agents, like Carnation milk, for example—a very large firm.
Q. Their headquarters are in California?
A. In San Francisco, yes.
Q. In the course of your employment with that firm, did you come in contact with various producers of shrimp in Mexico?
A. Yes, sir.
340 Q. Including those listed on that chart that was exhibited to you?
A. Yes, sir.
Q. Did the names on that chart include all the West Coast shrimp producers, or just part of them?
A. Oh, no, definitely not. There are many of them besides the ones listed there.
Q. You have been doing business in that area a good many years, have you not?
A. Yes, sir.
Q. How many years?
A. I started in 1946 there.
Q. In the nine years that have elapsed, you had become familiar with the shrimp market and the production of shrimp in that area, is that correct?
A. Yes, I think I have.
Q. Would you estimate the percentage of shrimp produced in the West Coast area of Mexico, the area you just described, represented by the firms that have been mentioned here, excluding Reno?
A. Excluding Reno?
Q. Yes.
A. It could be easier to let me include Reno.
The Court: I didn't hear the answer.
341 Mr. Kohn: He said, "Let me include Reno."
The Witness: I said it would be easier to include Reno.

By the Witness:

A. I would say it represents one-third of the total West Coast production.

By Mr. Kohn:

Q. Of the one-third represented by these producers, what percentage of that 33⅓% would be represented in the normal year by Reno?

A. Twenty to twenty-five per cent. This year should be about twenty per cent.

342 Q. Mr. Willis, Mr. Clayton pointed out to you that your Company has a position known as the chairman of the Board, is that correct?

A. Yes, that is correct. I just learned that today.

Q. Well, can you tell us just what the chairman of the Board does?

A. No, I can't.

Q. Was this an honorary position?

A. Yes, I think so.

Mr. Clayton: I will object to that, your Honor. If he does not know what the position is he would not know.

The Court: Why, certainly. He might be without honor altogether. Sustained.

By Mr. Kohn:

Q. Who is the present chairman of the Board?

A. Hernando DeCima.

Q. How long has he been chairman?

A. I don't know—wait a minute, I don't know. I thought he was Vice President. He may be chairman of the Board, also.

Q. You don't know who the chairman of the Board has ever been, is that correct.

A. No, I am sorry. I don't. I do know after reading it.

343 Q. You referred to several shrimp producers, such as the Congeladora del Pacifico?

A. Congeladora del Pacifico.

Q. Is that a corporation?

A. Yes.

Q. How long did you know that firm?

A. I have handled their production ever since they were in existence, which was—it was prior to the organization of Crest.

Q. What year?

A. They were organized in 1951.

Q. How long have you known Senor Pinson?

A. Oh, I would say since about 1950 maybe. Well, maybe 1949, quite a few years.

Q. How about the DeCima brothers?

A. Oh, I have known them many years. They have been very close friends of mine.

Q. How long have you known them?

A. Since 1945 or '46.
Q. How about Hector Feweira?
A. I have known him since 1946.
Q. You have had favorable business dealings with him?
A. With all of them.
344 Q. With all of them?
A. Yes.
Q. Are there any other producers listed on that chart that you recall?
A. Yes, there is Roberto Avendano.
Q. How long have you known him?
A. I first met him in 19, 1946 and '47.
Mr. Clayton: I do not want to forestall counsel—
The Court: I can't hear you.
Mr. Clayton: I do not want to forestall counsel from his line of inquiry except that I think it is immaterial, how long he knew him.
The Court: It seems to go beyond the scope of the direct, too.
Mr. Kohn: If the Court please, I was just going to ask one more question.
The Court: All right, ask one more question.

By Mr. Kohn:

Q. Have the business relations of all the people you have mentioned been favorable?
A. Most excellent.
Mr. Kohn: I have no further questions.
The Court: Any redirect?
345 Mr. Clayton: No, just one.

Redirect Examination by Mr. Clayton.

Q. Mr. Pinson and Mr. Coppel approached you to see whether you would not work with them, is that correct?
A. That is correct.
Q. They made certain propositions to you with respect to salary and working arrangements if you would come with this organization?
A. That is correct.
Q. And of course, you had to, I think you say, discussed it with Wilbur Ellis & Company that you were connected with before giving them their answer?
A. Yes, sir.

Q. You did that because you wanted to be insured that if you went with them you wouldn't be entering upon a venture that would not be profitable, is that right?

A. No, that is not right.

Mr. Kohn: If the Court please, I object.

The Witness: May I answer?

Mr. Kohn: All right.

By the Witness:

A. That is not right. I wanted to talk to them
346 first because I was employed by them. I thought it was the only honest thing to do. I was not concerned about whether it would be profitable because I had a long standing arrangement with Wilbur Ellis Company.

By Mr. Clayton:

Q. Well, you wanted to be, you wanted the salary arrangement guaranteed, didn't you?

A. That is correct.

Mr. Kohn: If the Court please, I believe my original idea was right. I want to renew the objection.

The Court: He has answered the question. The answer may stand.

By Mr. Clayton:

Q. And did you obtain a guarantee of your salary arrangement with Crest?

A. I did.

Q. And that was made by Nacional Financiera, wasn't it?

A. No. It was made by the means of a form of a—oh, almost like a debenture. It was deposited—

Mr. Kohn: If the Court please, I should have objected earlier. I move to strike the answer. I cannot see the relevancy at all.

The Court: The answer may stand. He has an-
347 swered.

Mr. Clayton: That is all.

The Court: Any recross?

Mr. Kohn: No. That is all.

The Court: You may step down.

(The witness excused.)

The Court: Have you finished, Mr. Clayton? Have you finished with this witness?

Mr. Clayton: With the exception, your Honor, of the document.

The Court: He is here under subpoena from California. He has produced documents as I ordered him to produce. I understand that you do not represent him. You have pointed that out, Mr. Kohn.

Mr. Kohn: That is right.

The Court: I will charge you with the responsibility of gathering these documents that he has produced pursuant to my order after the trial is over and seeing that they are returned to him. Those that we require here you can have photostatic copies made and substituted. All of them will be returned to him after the trial.

With that understanding there is no reason to keep him here, is there?

Mr. Clayton: No, sir.

348 The Court: The use you wanted with Mr. Willis, and after you were through I was going to ask that he can return to California.

Mr. Kohn: He sought only certain files that counsel were not interested in that you ordered—

The Court: If there are any that I have delivered to you pursuant to my order on him to produce, that you do not want, give them to Mr. Kohn this evening and he can send them on now.

Mr. Clayton: Yes.

The Court: As to the others, we will hold them, some of them I am holding until after the trial. You see that they are all gathered up, Mr. Kohn, and returned to him.

Mr. Kohn: Thank you.

The Court: With that understanding he may go back to California.

Mr. Kohn: Is it permissible, with counsel's permission, for Mr. Willis to remain in the courtroom the rest of the afternoon?

The Court: Yes. He is excused as far as I am concerned. He can do as he pleases.

Mr. Clayton, call your next witness.

Mr. Clayton: Mr. Appelbaum.

HENRY APPELBAUM, the defendant herein, recalled as a witness in his own behalf, being hereto-
349 fore previously sworn, resumed the stand and testified further as follows:

The Court: Proceed, Mr. Clayton.

Direct Examination by Mr. Clayton.

Q. I think that I had either asked or was about to ask—

The Court: Will you stand at the jury box. The jurors do not seem to be able to hear you.

By Mr. Clayton:

Q. I think I had asked or was about to ask about a telegram which you received from the plaintiff in the month of February, 1953.

Now, I show you Plaintiff's Exhibit 4 and ask you whether or not that is the copy of the telegram which you received about February 5, 1953 from the plaintiff.

And I think this has been introduced in evidence. This is a telegram to Penguin Frozen Foods, Inc., attention Henry Appelbaum, 120 S. LaSalle Street, Chicago.

"By resolution of our Board of Directors and in accordance with our contract with you signed in October 19, 1950, you are hereby notified that it is our will to ter-
minate such contract. You will please take note that
350 said contract in accordance to its clause, will thus end on August 15, 1953.

"Awaiting your acknowledgment of receipt of this notice we remain, yours truly,

Refrigeradora Del Noroeste, S.A."

Now, at the time that you received that telegram had any indication been given to you by the plaintiff that they intended to cancel your contract?

A. No, sir.

Q. And at the time that you received this telegram, did you have certain shipments which had been sent to you by the plaintiff?

A. We did.

Q. And at the time that you received this telegram, were you remitting to the plaintiff moneys received as a result of the sale of those shipments?

A. We were.

Q. And when were you remitting the money from the sale of the shipment at the time you received this telegram?

A. As each car was sold out.

Q. Did you send the money prior to the time the car was completely sold at the time you received this telegram?

A. Once or twice they called me to Mexico City and
351 said they were short, if I could send it a little earlier.

Q. Other than the times that they would communicate with you and tell you that they were in need of money, and ask you would you advance moneys, do I understand you correctly to say that you were remitting before cars were completely sold?

A. Yes.

Mr. Kohn: I object to Mr. Clayton making suggestions.

The Court: The last question may be stricken.

Mr. Clayton: All right. And the answer. There was an answer.

The Court: Yes.

By Mr. Clayton:

Q. Well, after you received this telegram of February 25, 1953, did you do anything or communicate with them concerning that?

A. I did.

Q. I show you plaintiff's Exhibit 5 and ask you to look at it and state whether or not this is a copy of the communication which you caused to be sent to the plaintiff after your having received the telegram of February 27?

A. I did.

352 Q. And this is a telegram sent to Refrigeradora Del Noroeste, S. A., and the address.

"In reference to your telegram per supplemental agreement signed July 22, 1952, contract is not subject to cancellation until 1954. Signed Penguin Frozen Foods, Henry Appelbaum."

That is a document, that is a telegram that you sent, is it?

A. Yes.

Q. Now, in the telegram of February 25, which you received from that, in which they stated that your contract of October, 1950, was terminated, I note that you refer to your supplemental contract signed July 22, 1952.

Will you tell the Court and jury whether or not at the time that you received the telegram on February 25, you were doing business under the 1950 agreement or under the supplemental agreement *signed July 22, 1952*?

Mr. Kohn: If the Court please, it was strictly a question of law.

The Court: It is a conclusion.

Mr. Kohn: In that the contract governs.

The Court: Sustained. It is in evidence.

353 By Mr. Clayton:

Q. After you had sent the wire referred to as plaintiff's Exhibit 6, or after you sent the telegram referred to as plaintiff's Exhibit 6 that I have just shown you, did you later receive another communication from them?

A. I did.

Q. Now, I will ask you to look at this document referred to as defendant's Exhibit 34 for identification, and state whether or not that is a photostatic copy of the telegram which you received after you had sent your wire in reply to the February 25 telegram?

A. Yes, sir.

The Court: What are we waiting for?

Mr. Clayton: Your Honor, the telegram is signed in Spanish. We have agreed upon the translation.

The Court: Very well.

Mr. Clayton: At this time I would like to introduce into evidence defendant's Exhibit 34 for identification.

The Court: Is that the one that is in Spanish?

Mr. Clayton: Yes.

The Court: We will not have to bring back the interpreter?

354 Mr. Clayton: No, sir, we will not.

The Court: Exhibit 34 may be received.

(Said document so offered and received in evidence was marked DEFENDANT'S EXHIBIT No. 34.)

Mr. Clayton: At this time I will read the English translation.

The Court: Very good.

Mr. Clayton: By agreement of counsel. This Exhibit 34 which has been received in evidence is a Western Union Telegram sent to the defendant by the plaintiff and the English translation of that is as follows:

"Replying yours of February 26 insist our notice cancellation contract. If wish discuss points suggest you come Mexico City."

Mr. Kohn: You translated that, Mr. Clayton?

Mr. Clayton: I think that says:

"Replying to yours of February 26 insist that our notice of cancellation exists. If you wish to discuss the point suggest that you come to Mexico City."

I think that is a fair interpretation of it, your Honor.

355 The Court: I will accept that not knowing any better.

By Mr. Clayton:

Q. Now, after having received defendant's Exhibit 34 that I have just referred to, did you receive any other communications from the plaintiff or any of the officers of the plaintiff?

A. I did.

Q. I show you defendant's Exhibit 4 for identification and ask you to look at that purporting to be a letter dated March 6, 1953 and ask you whether or not you have seen that document before?

A. I have.

Q. And is that a copy of a letter sent by you on the date it bears to an official of Reno?

A. It was. It was an official of the Nacional Financiera.

The Court: A little louder.

By Mr. Clayton:

Q. And was an official of the Nacional Financiera?

A. It was an official of the Nacional Financiera.

Q. His name was what, sir?

A. Oscar Fraustro.

356 Mr. Kohn: If the Court please, we have seen the original of this. This is not a correct copy. It does not show the—I am mistaken. I am confused. It is the next exhibit, I believe.

Mr. Clayton: At this time, your Honor, I move that defendant's Exhibit 4 for identification be admitted in evidence.

The Court: Exhibit 4?

Mr. Clayton: Yes.

The Court: It may be received.

(Said document so offered and received in evidence was marked DEFENDANT'S EXHIBIT 4.)

Mr. Clayton: With the Court's permission can I read it?

The Court: You may read it to the jury.

Mr. Clayton: (Reading.)

"Senor Don Oscar Fraustro, CPT Nacional Financiera—

The Court: A little louder.

Mr. Clayton: (Reading.)

"Nacional Financiera, V Carranza 25, Mexico D F Mexico

"Dear Sir:

357 In view of the very good relationship we have "enjoyed for the past years, I do not understand the recent letters and telegrams I have received regarding the cancellation of our contract with Refrigeradora del Noroeste.

"Per the agreement signed July 22nd, 1952, which I am enclosing a copy of, the contract was to run at least until 1954. However, this is not the point. All the members of the Reno Board of Directors should know by this time that any changes they wish to make in the contract which will benefit Reno and not hurt me can be made at any time, even if we have a contract for ten years.

"I have been doing very well for Reno in the past years and I just do not understand why the Board of Directors does not appreciate it.

"I wish you would write me and tell me what is the reason for these letters because every time I discuss the contract with the board, we always reach an agreement. I am sure that if there are any differences in the contract the Board of Directors wishes to discuss, we can reach

358 an agreement without threats of cancellation.

Yours very truly,
Penguin Frozen Foods
Henry Appelbaum."

And attached to that document on page 2 is:

"P. S. Just had a meeting with the insurance people and have worked out a deal to combine freight and truck insurance under one policy, thereby saving Reno about $2,000.00 a year."

Now, with this document you refer to your having enclosed a certain contract. Which contract did you enclose in this document that I have just read, sir?

A. The contract that we signed in '52, the supplemental agreement.

Q. The supplemental agreement.

Now, I show you defendant's Exhibit 5 and 5(a) for identification, defendant's Exhibit 5, being a letter purporting to be from one Oscar Fraustro to yourself, dated

March 11, 1953 in the Spanish language and defendant's Exhibits 5(a) for identification purporting to be the English translation of that letter.

I will ask you to look at that and state whether or not you received that letter after the communication
359 which I have just read that you sent to him?

A. I did.

Mr. Kohn: I have no objection to this letter except you will make it clear that the translation eliminates the letterhead which indicates that it is a letter on Mr. Oscar Fraustro's stationery as a certified public accountant, National University of Mexico, is that correct? With that stipulation we have no objection.

The Court: It may be received subject to that agreement.

(Said document so offered and received in evidence was marked DEFENDANT'S EXHIBIT 5 and 5(a).)

Mr. Clayton: May I read?

The Court: You may.

Mr. Clayton: I will state to the jury, your Honor, that I am reading from the English translation and that the Spanish letter was written on the letterhead of Oscar Fraustro, certified public accountant and auditor, National University of Mexico. It is dated Mexico, D. F. 11 of March, 1953.

360 "Mr. Henry Appelbaum,

"Penguin Frozen Foods,

"120 South La Salle Street,

"Chicago 3, Illinois.

"Dear Mr. Appelbaum:

"I received your letter dated the 6th of March, and I can indicate that indeed the members of the board of directors appreciate in their just value the services of distribution that you have made for Reno, and also the new arrangements of insurance on one policy combining the transportation by railroad and truck that you indicate will represent a saving for Reno of $2,000 per year.

"My personal interpretation on the letters and telegrams advising of the cancelling of the contract with Reno have no more object than to leave the new directors of Nacional Financiera in absolute liberty for the contracting for the distribution of shrimp by Reno, and not to give the impression it has formed an irrevocable contract for a long period.

361 "My impression is that they will be informed amply on the results obtained by your distribution and pre-

cisely those of the last season, they will not have any objection that you continue to handle such distribution.

"Thus I believe it would be advisable for you to visit this capital at the moment that it be necessary to determine the basis for the coming season's distribution.

"I take this opportunity to send you a cordial salutation.

"Oscar Fraustro, C.P.T."

I presume that means certified public accountant.

By Mr. Clayton:

Q. After having received that letter, did you reply to it, Mr. Appelbaum?

A. I did.

Q. By the way, when I refer to the "letter," that's a letter from Mr. Fraustro, and he is the gentleman that you refer to as being with Nacional Financiera?

A. And a member of the Board of Directors of Reno.

Q. And a member of the Board of Directors of Reno?

A. That's correct.

Q. I show you Defendant's Exhibit No. 6 for identification, and ask you to look at that document, and state
362 whether or not you have seen that?

A. I have.

Q. Is that the letter which you sent to Mr. Fraustro after having received the reply that I just read?

A. I did.

Mr. Clayton: I ask that Defendant's Exhibit No. 6 for identification be received in evidence.

The Court: It may be received.

(Whereupon DEFENDANT'S EXHIBIT NO. 6 for identification was offered and received in evidence.)

Mr. Clayton: May I have permission to read it?

The Court: You may read it.

Mr. Clayton: (Reading.)

"March 16, 1953

"Sr. Don Oscar Fraustro CPT

"Nacional Financiera

"V Carranza 25

"Mexico City, D. F., Mexico

"Dear Oscar:

"It was a pleasure to receive your kind letter and I am deeply appreciative of your clarifying the position of
363 the Reno Board of Directors.

"Whenever you advise me that it is the opportune

time to come to Mexico, I shall be most happy to do so. However, as the National Fisheries Institute convention runs from April 13th to April 15th, I would prefer coming after that date.

"I would appreciate it very much if you would make an appointment at an appropriate time for me to meet the Sub-Directors Gral of the Nacional Financiera. Also, any other appointments with people you feel I should meet.

"Hoping to hear from you soon as to when I should come to Mexico and with my very best personal wishes, I remain

"Yours very truly,

"Penguin Frozen Foods

"Henry Appelbaum."

By Mr. Clayton:

Q. Now, having sent that letter to Mr. Fraustro, did you receive, subsequent to that time, a communication from Mr. Pinson?

A. I did.

Q. I show you Plaintiff's Exhibit No. 6 and ask you 364 to look at it and state whether or not that is the letter you subsequently received from Mr. Pinson?

A. I did.

Mr. Clayton: With the Court's permission, could I have our associate read this?

The Court: Certainly. Are you offering it?

Mr. Clayton: That is already admitted; that is Plaintiff's exhibit.

But, first before you read that—

By Mr. Clayton:

Q. Where did you receive that letter?

A. Mazatlan, Mexico.

Q. From whom did you receive it?

A. Mr. Pedro Pinson.

Q. Did you receive it through the mail, or was it delivered personally?

A. It was handed to me.

Q. Had you seen Mr. Pinson before you received that letter from him in Mazatlan before he handed you that letter?

A. Yes.

Q. Where had you first seen him?

A. In Mazatlan.

Q. Had you seen him in Mexico City prior to re-
365 ceiving that letter?

A. I don't recall. I think I did. He was in Mexico City, and then he left Mexico City, and I was sent to Mazatlan to see him.

Mr. Karaba: (Reading.)

"Mr. Henry Appelbaum,
"Hotel Belmar,
"Mazatlan, Sin.
"Mexico.

"Dear Henry:

"This will confirm the conversations we have been holding during your visit to this city.

"To begin with, we shall do our best to obtain for your Company, Penguin Frozen Foods, in the territory where you are located, the representation of the new organization that will handle our production, and that of various other Mexican Plants, from October, 1953, on. You realize of course, that such decision, on the part of the new organization, will have to be based, not only on the final results of your operation with us, but also on the general policy to be decided by its Board of Directors.

366 "We are to send you, at the earliest possible moment, a detail of the differences found in your accounts by our Mr. Sergio Infante, during his visit to your offices this past February, and if Mr. Infante's figures are correct, you are to credit our account with the sum of said differences.

"Our Board is concerned with the large inventory of unsold shrimp now in Chicago, and in view of the termination of our contract, we would very much appreciate your advice in writing, to the attention of our Board, as to which are your ideas for the sale of said inventory.

"Getting back to the possibility of your handling, in your territory, the products of the new organization to which we now belong, the President of same Mr. John W. Willis, and the writer, will either contact you, or call on you, to discuss a possible agreement, as soon as the general policy of the new Company is decided by its members.

367 "It was nice seeing you in Mazatlan, and we remain,
"Sincerely yours."

And it is signed, "Pedro L. Pinson, President, delivered by hand."

By Mr. Clayton:

Q. I show you, Mr. Appelbaum, Plaintiff's Exhibit No. 20, purporting to be a copy of a letter addressed to Sr. Pedro L. Pinson dated July 22, 1953, and ask you to look at it and state whether that is a letter which you wrote to Mr. Pinson. This is the original.

A. I did at his request.

Mr. Clayton: Kindly mark these Defendant's Exhibits Nos. 35 and 36 for identification.

(Documents so marked.)

By Mr. Clayton:

Q. I show you Defendant's Exhibit No. 35 for identification, and ask you, sir, to look at it, and state whether this is a copy of a letter dated July 27, 1953, addressed to Penguin Frozen Foods, and sent by Mr. Pinson?

A. It is.

Mr. Clayton: At this time I move that Defendant's Exhibit No. 35 for identification be admitted in evidence.

The Court: It may be received.

368 (Whereupon DEFENDANT'S EXHIBIT NO. 35 for identification was offered and received in evidence.)

By Mr. Clayton:

Q. I show you Defendant's Exhibit No. 36 for identification, purporting to be a letter from Penguin Frozen Foods dated August 4, 1953, addressed to Sr. Pedro Pinson, and ask you whether or not you signed and sent the original of that copy?

A. I did.

Mr. Kohn: Mr. Clayton, this letter is authentic, but I am afraid I am going to object on the grounds of materiality. There is no controversy in this case, so far as I know, about—

The Court: Are you offering it? It hasn't been offered yet.

Mr. Clayton: I was preparing to offer it, Judge.

Mr. Kohn: I want to know the purpose of it.

The Court: I will rule on it if you offer it.

Mr. Kohn: I speak only in the interest of not cluttering up the record.

The Court: I can't hear your objection if he doesn't

369 offer it.

Mr. Clayton: It is offered as being material, because it answers the letter referred to as Plaintiff's Exhibit No. 20. These two answer those.

The Court: Hand up Plaintiff's Exhibit No. 20, and then I will hear your objection.

Hand it up to me. Arguing to him won't do you any good.

Mr. Kohn: He made a reference to the wrong exhibit. I think he means Exhibit No. 34, doesn't he?

The Court: Send them up here.

No. 20 is the letter of July 22, 1953. Are you offering 35 or 36?

Mr. Clayton: Both, Your Honor.

Mr. Sprecher: Both.

The Court: Are you objecting to both?

Mr. Kohn: Just the last one.

The Court: No. 35 is received without objection and No. 36 is objected to.

Is it your contention, Mr. Clayton that No. 36 is in answer to No. 20 of Plaintiff?

Mr. Clayton: The two of them are, Your Honor.

370 It is necessary to read No. 35 in order to get the purport of No. 36.

The Court: You contend that both of them answer Plaintiff's Exhibit No. 20?

Mr. Clayton: Yes.

The Court: Then I will read that one.

What is your objection to Exhibit No. 36, Mr. Kohn?

Mr. Kohn: I objected on the ground it was immaterial to any of the issues in the case. There is no question about the quality of shrimp. The contract didn't provide for any particular quality.

The Court: The objection is overruled. It will be received for whatever it is worth as an answer to Exhibit No. 20 that was received on behalf of the Plaintiff.

(Whereupon DEFENDANT'S EXHIBIT NO. 36 for identification was offered and received in evidence.)

The Court: You may proceed.

Mr. Clayton: Please mark this Defendant's Exhibit No. 37 for identification.

(Document so marked.)

371 By Mr. Clayton:

Q. I show you Defendant's Exhibit No. 37 for identification, purporting to be a copy of a letter sent to Penguin Frozen Foods dated August 13, 1953, from Mr. Pedro L. Pinson, and ask you to look at that and state whether or not you received the original of that letter?

A. I did.

Mr. Kohn: What was the date of that?

Mr. Clayton: August 13th.

At this time, Your Honor, we would move that Defendant's Exhibit No. 37 for identification be admitted in evidence.

The Court: Is there any objection?

Mr. Kohn: Yes, sir. I want to object, because I can't see where it is material to any issue in the case.

The Court: Hand it up.

Mr. Kohn: It has to do with prices, that we have not made any change—

The Court: What is the materiality of it, Mr. Clayton?

Mr. Clayton: The materiality of it is in connection with Mr. Willis. They introduced in evidence—I don't re-
372 call the number of the exhibit—a telegram in which they refer to sales to Mr. Willis, and that will show our sales, the price that we received here in excess of those that they would have got if they sold to Mr. Willis.

The Court: Is the question of price at issue?

Mr. Kohn: No, sir. If the Court please—

The Court: I am asking Mr. Clayton.

Mr. Clayton: No, sir, but it certainly goes to tie Mr. Willis in with this entire transaction.

The Court: I don't see where it does. The objection is sustained. Exhibit No. 37 will not be received in evidence.

Do you have any more? About where would be a good stopping point?

Mr. Clayton: This is a good stopping point.

The Court: Right now?

Mr. Clayton: Yes, sir.

The Court: Will you assemble all of these in the morning?

Mr. Clayton: Yes, sir.

The Court: We will probably make as good time by recessing now.

373 We will recess until 10:00 o'clock tomorrow morning.

(Whereupon an adjournment was taken in the above-entitled cause until Friday morning, June 10, A. D. 1955, at 10:00 o'clock.)

374 Before Judge Campbell, and a Jury, on Friday, June 10, at 10:00 a. m.

Court reconvened pursuant to adjournment.

Present:

Mr. Louis A. Kohn, Mr. Patrick O'Brien, appeared on behalf of plaintiff;

Mr. Robert A. Sprecher, and Mr. Joseph Clayton, appeared on behalf of defendant.

375 The Clerk: No. 53 C 2482, Refrigeradora Del Noroeste, *vs.* Henry Appelbaum, on trial.

The Court: Ready to proceed, gentlemen?

(The following proceedings were had in the Courtroom in the presence and hearing of the jury.)

The Court: Will you resume the stand, Mr. Appelbaum?

HENRY APPELBAUM, the defendant herein, being heretofore previously sworn, resumed the stand and testified as follows:

Direct Examination by Mr. Clayton (Continued).

Q. Mr. Appelbaum, you are the same Henry Appelbaum that was testifying yesterday when the Court adjourned, sir?

A. Yes, sir.

Q. Prior to adjourning yesterday, I had shown you certain telegrams which you had received, some of them mentioning the fact that you had come to Mexico City. Do you recall those documents?

A. Yes, sir.

Q. Now, after you had received those telegrams and letters in February and March of 1953, did you later go to Mexico?

A. Yes, sir.

376 Q. Do you recall now when you went to Mexico?

A. In July of 1953.

Q. Will you keep your voice up so that the jury can hear?

A. July, 1953.

Q. Now, when you went to Mexico in July, 1953, who did you see in connection with your meeting with Reno?

A. Well, Mr. Alcalde met me at the airport.

Q. Will you tell the Court and jury who Mr. Alcalde was?

A. Mr. Alcalde was the chairman of the Board of Reno.

Q. And was he connected with Nacional Financiera?

A. No, he was not.

Q. When he met you at the airport, did you have a conversation with him concerning Reno and your dealings with it?

A. I did.

Q. What did he say to you and what did you say to him?

A. He told me that— He said that it was too late. I came there too late. I should have been there six months before; that all the deal was through the new organization. They had formed a Company in Mexico and Crest got the distributorship from the E. A., corporation that was formed in Mexico and he said nothing they will tell me or nothing that they will do can alter the situation.

377 Q. Now, did he say anything about whether or not that—that is, Reno—was committed to this deal?

A. He said they were absolutely committed to the deal, and there is nothing anybody could do to change it.

Q. After you had that conversation with him, did you see any other person?

A. Yes, I saw Jose Saenz.

Q. Well, about when did you see Jose Saenz with respect to the date that you arrived?

A. That evening.

Q. Can you now tell the Court and jury the approximate date in July that you arrived in Mexico?

A. It was either the 21st or the 22nd.

Q. When you saw Jose Saenz, where did you see him?

A. I saw him at my hotel.

Q. Tell the Court and jury who he is and where he fits in the picture?

A. Mr. Saenz was an official of the Nacional Financiera and this Reno corporation was under his charge. All the transactions between Penguin Frozen Foods and Reno, outside of the physical handling of the shipment, was handled through him.

Q. Will you tell the Court and jury- you said physical?

378 A. Outside of the physical delivery.

Q. What did Mr. Saenz say, if anything? What did you say to him?

A. I asked Mr. Saenz what was going on, and he said, "Well, the deal with the Mexican corporation was formed, and the distributorship given to Jack Willis, and they were going to organize a company in California called Crest for distributing all the shrimp in the United States," and he said, that he had a big fight on the Board, but since the change of administration in the Nacional Financiera, the new man came in, which was Martinez-Ostos, that the jurisdiction of Reno was taken away from him and given to Mr. Fraustro.

Q. The Mr. Fraustro that he referred to, is that the same Mr. Fraustro that testified here yesterday?

A. Yes, sir.

Q. Did you at that time ask him what effect that had with your contract, or what they expected to do with your contract?

A. I did, and he said he advised them that we had a contract continuing until 1954, but they had orders from Mr. Ostos to go along with Mr. Pinson's recommendation, and they should go through with the deal, and he says they did. There was nothing nobody could do about it.

379 Q. After you had that conversation with him, did you see Mr. Fraustro?

A. I did the next day.

Q. Where did you see him?

A. At his office at the Nacional Financiera.

Q. Will you tell the jury and his Honor what was said at that meeting?

A. I asked Mr. Fraustro, I said, "I understand that you are trying to cancel our contract."

He says, "Well, the Board decided, Mr. Ostos decided that you had no contract, but we know that you have done such a wonderful job since you have been with us that I am sure that if you go to Mazatlan and see Mr. Pinson that he will arrange a deal with you that is better than the one you had, and that you will be perfectly satisfied to go along with this deal."

Q. Up to that time had you discussed or talked with Mr. Pinson since you had been in Mexico City?

A. No, I hadn't.

Q. After your conference with Mr. Fraustro, did you go to Mazatlan?

A. I did.

Q. Approximately when was that with respect to the date that you talked with him?

A. That was a day or two later.

380 Q. Did you see Mr. Pinson at Mazatlan?

A. I did.

Q. Will you tell the jury just what was said by each of you, if anything, concerning this matter?

A. Mr. Pinson said, "I don't want you to feel that this is any reflection on the job that you have done, because we realize that you have done an outstanding job, and we want you in this organization."

I said to him, "What is this organization? Why was this organization formed?"

And he said, "The only reason that we have discontinued your contract and made the new organization is for two reasons, and has absolutely no relationship to what you have done."

"And those two reasons," he says, "are one, that eventually through the Nacional Financiera we are going to get all the shrimp distributors into this organization so that we can control the buying and selling price of the shrimp in the United States; and the second reason, is that with the set-up that we had with you, that at some future time we might have some trouble with the United States Government as far as income tax and—"

Mr. Kohn: If the Court please, I wish to object 381 to the last two sentences in the witness' testimony. They have no relevance to the issues in the case, and are only meant to prejudice and influence the decision in material matters.

The Court: Is that part of the conversation with Mr. Pinson?

The Witness: Yes, sir.

The Court: The objection is overruled. The whole conversation may be heard by the jury.

By the Witness:

A. (Continuing.) He said, "We have got to show an in-between transaction, because the Government might claim that we had made the money in the United States, and we would be subject to income tax. That is why we have formed this Mexican Company."

By Mr. Clayton:

Q. Where did this conversation take place, sir?

A. In Mr. Pinson's office.

Q. Now, after you had had this conversation with him, or while you were in his office, did he hand you anything?

A. Not at that time.

Q. Did he later give you a document?

382 A. Yes, he did.

Q. Approximately how much later?

A. Oh, about an hour later.

Q. Where were you at the time that he handed you the document?

A. In his office.

Q. I show you, sir, Plaintiff's Exhibit 6, being a copy of a letter dated July 17, 1953, and signed by Pedro Pinson, and ask you whether or not the original of that document was the one that was handed to you at the time that you just mentioned?

A. It was.

Mr. Kohn: On what date is that?

Mr. Clayton: July 17th.

By Mr. Clayton:

Q. Now, after he gave you this document what, if anything, did you do or say?

A. I said, "I don't know why you hand me a document of this kind."

The Court: What was the number of that document?

Mr. Clayton: Plaintiff's Exhibit 6.

The Court: Thank you. Go ahead, I am sorry.

383 By the Witness:

A. (Continuing.) "Here when you could have given me this in Mexico City. Why you make me make a trip all the way to Mazatlan to hand me this."

By Mr. Clayton:

Q. What response, if any, did he make to that statement?

A. He said, "Well, this is just a formality and I will be in Chicago on August—I will have to come to San Diego on August 10th, and when I am there I will come to Chicago, and I will make you a deal that will be much better than the one that you have got."

Q. Did you return to Mexico City?

A. I did.

Q. When you returned to Mexico City, did you see any

persons there in connection with what transpired between yourself and Mr. Pinson in Mazatlan?

A. First I saw Mr. Fraustro, and I told him I was not satisfied at all with the answer I got from Mr. Pinson, and there was nothing transpired—all he handed me was a letter which he could have given me in Mexico City.

And, I insisted upon seeing Mr. Ostos.

Q. Who was Mr. Ostos?

A. Mr. Ostos was the general manager, called the
384 subdirector of the Nacional Financiera.

Q. Did you succeed in seeing Mr. Ostos?

A. I finally did.

Q. Who was present at this meeting with Mr. Ostos?

A. Mr. Ostos, George Castle, and myself.

Q. Will you tell the Court and jury what was said by each of the parties, if anything, in this conference?

Mr. Kohn: If the Court please, I wish to object to this question, because none of the persons mentioned were officers of Reno.

The Court: Yes, I sustain the objection.

Go on.

By Mr. Clayton:

Q. After this conversation with Mr. Ostos, did you see any other person connected with Reno before leaving Mexico City?

A. I saw Mr. Pinson.

Q. Where did you see Mr. Pinson?

A. Mr. Pinson called me on the telephone, and he told me there was going to be a meeting with the Board of Directors the following day, and he would like to have me give him a letter giving him my opinion of the market on shrimp and the inventory that we had on hand,
385 and if I could write it that night, and he would pick it up the next morning.

Q. Did you give him such a letter?

A. I did.

Q. Now I show you, sir, Plaintiff's Exhibit 20, and ask you to look at it and state whether that is the letter which you have Mr. Pinson in response to the request made to you over the telephone to furnish him a letter setting forth the condition of the market?

A. It is.

Q. Now, after having given him this letter setting forth the condition of the market and the other informa-

tion that he requested, did you see any other person that was connected with Reno?

A. I did.

Q. Who did you see?

A. Mr. Alcalde and Mr. Saenz.

Q. Will you tell the Court and jury what was said at that meeting?

Mr. Kohn: If the Court please, I will object unless counsel specifies the date.

The Court: Yes, lay a foundation.

By Mr. Clayton:

Q. If you can tell us the approximate date on 386 when the meeting took place?

A. It was the next day.

Q. The following day?

A. No, I want to correct that. It was that evening.

Q. The same evening?

A. The same evening.

Q. Was it before or after the Board of Directors' meeting?

A. After.

Q. Where did this meeting take place?

A. In my hotel room.

Q. Will you now tell—

A. At the Balmer Hotel.

Q. Will you now tell the Court and jury just what was said by each of the parties?

A. Mr. Saenz says, "What kind of letter did you give Mr. Pinson?"

I said, "I gave him the letter that he asked for. Why?"

He said, "He came up to the Board of Directors' meeting, and he asked or told the Board of Directors that that letter was in response to the one that he gave you in Mazatlan."

Well, I said, "There was no such thing. He asked 387 me for information about the inventory and that is all the information I gave him, because he said the Board of Directors wanted to know."

Q. Now, I show you, sir, Defendant's Exhibit 35, and ask you when you received that letter?

A. On July 27.

Q. And that was after you had given a letter to Mr. Pinson that you just mentioned?

A. That is right.

Q. I show you Defendant's Exhibit 36 for identification, and ask you to look at that document and state whether or not the original of that was sent to the addressee?

A. It was.

Q. Approximately what date?

A. On August 4th.

Q. With respect to Defendant's Exhibit 36, what was your reason for submitting that document to him?

A. I had told Mr. Pinson at Mazatlan that I would answer that letter to him when I got back to Chicago, and would have a chance to check into the things that he wanted to know.

When Mr. Saenz told me that that other letter was an answer to the one he gave me, I wrote this letter.

Mr. Clayton: Might I, your Honor, be permitted 388 to read the two documents to the jury?

The Court: Yes, they were—

Mr. Clayton: They were received yesterday.

The Court: Have they been received?

Surely then, go ahead and read them.

Mr. Clayton: The letter of July 27, addressed to Mr. Henry Appelbaum—

The Court: Give the exhibit number.

Mr. Clayton: That is Defendant's Exhibit No. 35. It is on the stationery of Refrigeradora del Noroeste, S.A., Mazatlan Sinaloa, Mexico, July 27, 1953.

(Reading.)

"Mr. Henry Appelbaum,

Penguin Frozen Foods,
120 South LaSalle St.,
Chicago, Ill.,
U. S. A.

"Dear Henry:

"This will acknowledge receipt of your favour of 389 July 22nd, which you wrote us in reply to our letter of July 17th.

"Your letter was duly presented to our Board of Directors, and after having taken due note of its contents, it is the desire of the members of said Board, that now that you are back in your offices, we will appreciate more detailed comments as to what are your ideas and suggestions for the sale of Inventory now in Chicago. We mean both on the small and large shrimp.

"In general terms, our Board's opinion seems to be that sales should be made as quickly as possible, provided, naturally, that the prices are satisfactory.

"Thus, we shall await your letter, at the earliest possible moment.

"In the meanwhile, we remain,

"Cordially yours,

"/s/ Pedro L. Pinson,

President."

390 And it indicates that a copy of this letter was sent to Mr. Ostos, and Mr. Fraustro.

A letter of August 4, Defendant's Exhibit 36, is addressed to (Reading):

"Sr. Pedro Pinson
Refrigeradora del Noroeste SA
Mazatlan Sin Mexico.

"Dear Pedro:

"Received your letter dated July 27th and wish to inform you that my letter of the 22nd was not in answer to your letter of the 17th. In fact, I have not answered your letter of the 17th as we are preparing figures to show you where Mr. Infante has omitted several important factors. I think you know after my conversation with you that the expenses as charged to you are correct. Our detailed reply to this and to Mr. Infante's letter dated July 20th will follow shortly. This letter was received in our office on August 3rd for which reason you have
391 not received a reply earlier.

"My letter of the 22nd was in answer to your telephone request of the 21st, that I give the board my opinion as far as the inventory is concerned.

"Now in answer to your letter dated August 1st, I wish to inform you that we have quotations from Carmen as follows:—"

I don't suppose it is necessary to read the quotations.

"Delivered Chicago"—that is referring to the prices—the quotations which I did not read.

"These prices are for whites and we were quoted Browns at 2 cents less.

"I thought that when we got a load of large shrimp in, we might be able to discount these a little and sell the small ones at a better price.

"However, the last car is at least ten days away and from the books of the market today, we should try to get

as much as we can for the large shrimp now. Unless
392 we want to sacrifice the small shrimp, it will not help us very much to move them, because at this time large quantities of small shrimp are just not being bought, except at ridiculously low prices. I look for this market to get better on these sizes and see no reason why we should sell the small shrimp at the low prices that are being offered at the present time. I don't believe they can go any lower. We should wait for a spot in the market, when inventories will be cleaned up, and we can realize more money than is possible at present.

"However, if you think you want to move your inventory of 31/42s, I believe we can unload them at between 48 and 50 cents. The sizes smaller are absolutely at a stand still and the licking would be too great for you to take. You have nothing to lose, at least not very much, if you hang on for a few weeks.

"Never, in the shrimp market has there been such a large spread between the large and small sizes as there is today.

393 "Brownsville is quoting at least 16 cents a pound less on the 15/20s than we are getting in order to move some of the smaller sizes at cheap prices.

"There is no production of U/10s, U/15s and 16/20s to speak of. That is why we are able to get such high prices, also one of the reasons we have been selling as fast as we can.

"I think one of these days the small ones are going to be less plentiful and the market will reverse itself to where 15/20s will be lower and smaller shrimp will come up and lessen the spread.

"If you will recall, at least five or six weeks ago, I asked you for a letter authorizing me to sell the small shrimp and for you to give me the minimum prices at which we might sell. At that time we could have unloaded them at a reasonable figure. At this writing, I have not received any instructions or authorization in writing from you and I do not want to take it upon myself to sell
394 under the market, which I wanted to do at that time. This was the only way the small shrimp could have been moved.

"Awaiting your pleasure, I remain,

"Yours very truly,

"Penguin Frozen Foods,

"Henry Appelbaum."

By Mr. Clayton:

Q. Now, after you have written that letter to him, did you receive a reply?

A. I don't recall.

Q. Now, you say—what was your answer?

A. I don't recall.

Q. I will show you Defendant's Exhibit 37 for identification, which purports to be a copy of a letter sent by Mr. Pedro L. Pinson to Penguin Frozen Foods, dated August 13, 1953, and ask you to look at that and state whether or not that refreshes your recollection as to whether you received a response subsequent to that letter?

A. Yes, I did.

Mr. Clayton: Now, your Honor, yesterday we of-
395 fered this in evidence. It was not admitted. I think in view of the testimony so far at this time, I would move that Defendant's Exhibit 37 be admitted in evidence.

The Court: The answer is that he has now identified it?

Mr. Clayton: Yes.

Mr. Kohn: My objection yesterday is equally tenable today. It has to do with prices which are not involved in this controversy.

The Court: Since we have read one-half of the correspondence, I will reverse the ruling and permit the other half to go in, so the jury may be fully informed.

It will be received.

(Whereupon said document marked DEFENDANT'S EXHIBIT 37 for identification, was received in evidence.)

Mr. Clayton: Might I be permitted to read this?

The Court: You may be permitted to read it.

396 Mr. Clayton: (Reading.)

"Penguin Frozen Foods,

120 South LaSalle St.,

Chicago, Illinois.

"Confirm todays phone conversation as to firm bid received through Willis for all present inventory thirty one fourty twos at fourty eight cents delivered Detroit Stop Please contact Willis immediately and unless you can get better price or equal for same poundage effect sale through him Stop Minimum price acceptable for fourty three sixty fives fourty two cents Chicago provided sale involves total present inventory that size and is made between now and Monday Stop Recall you Willis offer good

until tomorrow thus make sure if you do not take it you can equal or better his price between now and next Monday on a sale involving total inventory that size."

That is signed "Pedro L. Pinson."

By Mr. Clayton:

Q. Now, Mr. Appelbaum, did you effect a sale?

397 A. Before we received this wire, we submitted a fifty pound sample case to the A & P in Detroit, which they accepted at 52 cents a pound.

Q. I show you Plaintiff's Exhibit 7 and ask you to look at that and state whether or not you received this document which purports to be a telegram from Pedro to you?

A. I did.

Q. Now, with respect to the receipt of that document—that is, Plaintiff's Exhibit 7—that was with respect to what?

A. That was with respect to this—the wire telling me to sell the 31/42s shrimp to Jack Willis.

Q. Did you sell them to Mr. Willis?

A. I did not.

Q. To whom did you sell?

A. To the A & P Tea Company in Detroit.

Q. The reason for selling them to the A & P rather than to Mr. Willis was what?

A. We did not consider Mr. Willis had anything to do with them at this time.

Q. What was the price that was quoted by Mr. Willis?

A. The price quoted by Mr. Willis through a broker in Detroit was 48 cents delivered, Detroit.

398 Q. What did you get for them?

A. We wound up getting 50 cents a pound for them. We originally sold them for 52, but we had to give them a discount of two cents because of the offer of Jack Willis.

399 Q. By the way of clarifying something, Mr. Witness: Defendant's Exhibit 37, would you look at that and state whether or not that was a direction to sell through Mr. Willis or whether or not it was a direction to contact him to see whether or not you can get better prices and if not then to sell to him?

A. No, I think this was—

Q. If you will keep your voice up so that they can hear you.

A. This was not a direction to sell to Mr. Willis; this was a direction to sell through him.

Q. A direction to sell through him?

A. That is right, if we wanted to.

Q. Now, after the exchange of communications that have just been referred to, did you receive any other communications from Mr. Pinson or from Reno concerning your contract with it?

A. I did several.

Q. Now, during the month of July, 1953, had you been receiving shipments of shrimp from Reno subsequent to the notice of termination that was sent in February?

A. Yes, sir.

Q. And prior to the receipt of the notice of cancellation from Reno in February of '53, what had been the
400 practice with respect to remitting payment for the shrimps since 1952, the date which you started operating under the extension agreement?

A. We remitted to the First National Bank as the cars were sold out and the money collected from the sales.

Q. Prior to the date that the extension agreement was signed, what had been the practice with respect to remitting payments for the shrimps received?

Mr. Kohn: If the Court please, there is nothing in controversy about the payments during that period of the earlier agreement. I do not see the relevance of it at all.

The Court: What was it you want to bring out? There is no question but what they were all paid for, is there?

Mr. Kohn: The earlier shipments were paid.

The Court: Under the original contract. Let us not clutter up the record where it is not necessary.

Mr. Kohn: There might be some hold over items.

By Mr. Clayton:

Q. Now, I show you Plaintiff's Exhibit 7 and ask you whether or not you received the original of that document, purporting to be a Western Union telegram dated
401 August 20, 1953, sent to Penguin Frozen Foods by Mr. Pinson?

A. It is.

Q. And subsequent to receiving this telegram in which you were told that among other things, "That consequently repeat our office immediate disposal total inventory to Crest Importing Company as only way relieving you your

actual obligation Bank of America and terminate amicably for business relations."

After your having received that telegram containing among other things that statement, did you reply to them?

A. I did.

Q. And I show you, sir, a document, Plaintiff's Exhibit 8, being a copy of a telegram sent by you to Mr. Pinson and dated August 20, 1953.

Did you send that document to Mr. Pinson?

A. I did.

Q. And that was in response to the telegram that you had received that had just been shown and marked Plaintiff's Exhibit 7?

A. That is correct.

Q. Now, after having sent Plaintiff's Exhibit 8 which was justed handed to you and which states, "Regarding your telegram received August 20, conclusively proves
402 your intention to wash me out of the picture in violation of your contract notwithstanding my great service and contribution. I am not interested in any piecemeal settlement. I intend to protect our Company against your obvious move to repudiate your obligations and when you are prepared to keep your repeated promises to send authorized representatives to Chicago I am willing to do everything I can to work out an amicable solution."

After having sent that wire to the Plaintiffs did you receive Plaintiff's Exhibit 9?

A. I did.

Q. And Plaintiff's Exhibit 9 reads as follows:

"Pinson Frozen Foods, 120 S. La Salle Street, August 24, 1953.

"ReTel surprised tone you use which consider totally uncalled for. There is no violation our contract which was duly and legally cancelled. We do not wish to start unconstructive polemic thus in accordance clause 13 shall appreciate your closing account advising us at once of final figures which shall be duly verified by authorized representatives so that inventory can immediately be disposed of."

After having received that communication from
403 them, did you then receive or send to them Plaintiff's Exhibit 10 which I show you and purports to be a telegram from Penguin Frozen Foods to the Plaintiff dated August 25, 1953?

A. I did.

Q. And in that document you were advising them what, sir?

A. That our contract is in full force.

Q. And—

A. Until '54.

Q. I see.

Mr. Clayton: The last exhibit was 37. Mark this Defendant's Exhibit 38.

(Said document was marked Defendant's Exhibit No. 38 for identification.)

By Mr. Clayton:

Q. I show you Defendant's Exhibit 38 for identification, sir, which purports to be a copy of the telegram sent by the Plaintiffs to Penguin Frozen Foods and dated August 27, 1953 and ask you to look at that and state whether or not you received the original of that document?

A. I did.

Mr. Clayton: At this time I move that Defendant's Exhibit 38 for identification be admitted in evidence, your Honor.

404 The Court: It may be received.

(Said document so offered and received in evidence was marked DEFENDANT'S EXHIBIT NO. 38.)

By Mr. Clayton:

Q. Now, will you tell or can you tell without referring to it, sir, the jury, the contents of this document what they advised you?

Mr. Kohn: Mr. Clayton, why not read the document. You read it.

Mr. Clayton: (Reading.)

"Have advised Bank of America accept immediate payment all shrimp already sold, 92% of selling price as shown your weekly sales report of which last one received was dated August 21. On balance inventory shall continue accept this payment procedure as weekly sales reports are received and provided prices shown are acceptable to us. This to be in figure up to September 11 and in lieu of our making immediate use of Clause 13 which shall apply on unsold inventory after above specified date. If wish discuss other matters your mind shall gladly meet with you in Mexico City your convenience. Signed Refrigeradora

405 "Del Noroeste, S.A."

Now, after having received that communication from them did you reply to that, sir?

A. I did.

Q. And I show you Plaintiff's Exhibit 11 and ask you to look at that document, which purports to be a copy of a Western Union telegram sent to the Plaintiff by Penguin Frozen Foods, dated August 28, 1953 and will you look at it and state whether or not you sent the original of that document?

A. I did.

Q. And the document is a Western Union telegram dated August 28, 1953 to Refrigeradora Del Noroeste, S.A., street and number Avenue Juarez 64.

"I do not intend to continue a pointless exchange of telegrams. At your request I came and stayed two weeks in Mexico with no results. I now insist that you keep your commitment to send authorized representative to Chicago."

Now, after having sent this telegram on August 28, did you receive a reply to that?

A. I don't recall.

Q. Now, did you later see a person that purported 406 to be the representative of the Plaintiff in Chicago?

A. I did.

Q. Who was that person?

A. Oscar Fraustro.

Q. And approximately when did you see Mr. Fraustro in Chicago?

A. I believe it was sometime in September.

Q. And when you saw him that was in your office, was it, sir?

A. That is right.

Q. Can you tell us who was present, if any person other than yourself and Mr. Fraustro who was in on the conference?

A. There were several conferences. I don't remember whether this one of Mr. Fraustro and myself or Mr. Fraustro and my son and myself.

Q. Well, referring to the first conference that you had with Mr. Fraustro here in Chicago, will you tell the Court and jury what was said by each of you gentlemen?

A. Mr. Fraustro said, "Why don't you go along with this thing? This thing is bigger than the thing that you have got and eventually it will prove a much greater deal than the one that you have now."

407 I said, "Well, we have a contract and I want them to go through with the contract."

He said, Why don't you try to arrange another deal so that you can distribute the shrimp for Crest?"

I said, "I am not interested in Crest and I want to go through with the contract."

He said, "Well, this will be a much better deal. Won't you listen to a proposition?"

I said, "I am always ready to listen."

And we discussed pro and con what a fair contract would be and I told him that we, if we could get enough shrimp to take care of our commitments and if we could make a deal that would give us as good or better than the one we had, I would be interested.

Q. And what if anything did Mr. Fraustro say or do at that time?

A. Mr. Fraustro offered me $12,000.00 to forget about the contract.

Q. And did you see him the following day or sometime later?

A. I saw him the following day.

Q. And was that at your office?

A. That was at my office.

Q. By the way, Mr. Appelbaum, when Mr. Fraustro
408 was in your office on this occasion, was there any interpreter with him?

A. No.

Q. And did he speak, what language was it?

A. English.

Q. English?

A. Yes, that is right.

Q. Were you able to understand him?

A. I sure was.

Q. Now, on the second day, the second meeting when he came to your office, was he alone or was he with someone?

A. I think his brother was with him.

Q. What if anything was said during this conference?

A. The same thing as he had the day before was repeated, and finally he said—he said that if he could give me enough shrimp to take care of my commitments—I don't remember whether this was at that conference or the day after but he was going to call Mexico City if he could arrange to get—he offered—he said he would get me 3 per cent commission from Crest and we discussed

the thing and I said, "Well, if we get sufficient amount of shrimp, the amount of commission does not make too much difference, even if it was two and one-half per cent and we were assured of the supply of shrimp, enough
409 to take care of our accounts, that is the thing that interested me most.

And he was going to contact Mexico City to find out whether he could get a sufficient guarantee that we would get enough shrimp to net us as much or more than we had on the previous year's contract.

Q. Now, did you see him on another occasion, the third time?

A. I did.

Q. Do you recall when that meeting took place?

A. In my office.

Q. Who was present?

A. Mr. Fraustro, Mr. Collenburg and Jack Willis.

Q. When you say—

A. And my son.

Q. When you say Mr. Jack Willis, you mean the Mr. Willis who testified yesterday?

A. Yes, sir.

Q. And the Mr. Collenburg that you referred to is the gentleman—

A. The attorney from—

Q. —attorney from New York?

A. Yes.

Q. Will you tell the Court and jury what transpired
410 during this conference, what was said by each of the respective parties?

A. Mr. Collenburg and Mr. Fraustro and Jack Willis came into my office and said they would like to sit down and talk to me. And Jack Willis I knew and I asked him who Mr. Collenburg was and they said he was the lawyer for the Nacional Financiera from New York.

Q. Would you keep your voice up so that the last gentleman can hear you?

A. They said he was the lawyer for the Nacional Financiera from New York.

I said, "Well, as long as you got a lawyer here, I am not going to have any conferences until I get my lawyer here" and I got Stanford Clinton and he came over and we sat down and had a discussion.

Q. Now, after Mr. Clinton came was there a discussion

had concerning the attempted cancellation of your contract by Reno?

A. There was. They claimed we had no contract and in order to settle it peacefully they were going to offer me a sub-brokerage from Crest. That is why Jack White was there.

Q. Keep your voice up, sir.

What proposition did they make with respect to
411 this brokerage?

A. They were going to give me two and one-half per cent, and they were going to give me whatever boxes to pack the shrimp in, whatever boxes they had left in the last year's operation in Reno boxes because they were going into a new brand with no guarantee as to quantities and he would let me have a few of the accounts that we had serviced but he would not give me any district, that he couldn't appoint any other broker and he would ship me the shrimp when he thought it was available but he wouldn't specify what minimum quantity and this went on over—

Q. What did you say in response to that proposition?

A. I said I wasn't interested in any proposition of that kind because—

Q. Keep your voice up.

A. I wasn't interested in any proposition of that kind because we had a contract and I had to take care of the commitments we had to our customers and that offer was no assurance that I could do it.

Q. Did you have another conference which was attended by these same gentlemen?

A. Oh, by the way, during that conference they offered me $25,000.00 if I would accept the brokerage on their
412 terms and I said, "No". Then they offered me $40,000.00 if I would step out of the contract.

Q. What did you do?

A. I refused it.

Q. And then what happened?

A. They were going to consult with Mexico City and they were going to come back in the afternoon.

Q. Did they return that afternoon?

A. They did return that afternoon.

Q. What took place when they returned?

A. Mr. Collenburg said, "Will you take the $40,000.00 that we had offered you?"

I said, "No, sir."

"And step out of the contract?"

He said, "Well then, there is nothing left for us to do. Then I suppose we will have to go through with the contract."

Q. What did you say?

A. I said, "That is all right with me, if I get assurance that they are going through with the contract."

Q. You say that you told them it was all right if you got assurance, what?

A. That they were sincere in their offer.

Q. By the way, at the time that this first contract
413 was entered into between yourself and Reno in October of 1950, did you loan the Plaintiff any money?

A. I did.

Q. And the sum was what?

A. $80,000.00.

Q. Was that secured?

A. That was guaranteed by the Nacional Financiera.

Q. When you told the gentlemen, that is, Mr. Willis and Mr. Collenburg and Mr. Fraustro that it was all right with you that they went along with the contract if you receive the guarantee that they will perform, did you tell them what guarantee you wanted?

A. Not at that time.

Q. Now, what was your reason for wanting a guarantee that they would perform their contract?

Mr. Kohn: If the Court please, I object to his statements and the reason. This is his mental process.

The Court: Sustained.

Mr. Kohn: Not necessary to the case.

By Mr. Clayton:

Q. After this conference did you later talk to Mr. Collenburg?

A. I did.

414 Q. Was that in person or by telephone?

A. By telephone.

Q. And did you call him or did he call you?

A. He called me.

Q. Before talking with Mr. Collenburg did you receive a communication from the Plaintiffs?

A. I did.

Q. And I show you Plaintiff's Exhibit 12 and ask you to look at it, it purporting to be a copy of the letter from the Plaintiffs, Penguin Frozen Foods, dated October 3, 1953?

A. It is.

Q. Did you receive that?

A. I did.

Q. This is a letter dated October 3, 1953, to Penguin Frozen Foods, 120 S. LaSalle Street, Chicago, Illinois:

"Dear Sirs: Herewith enclosed you will find a copy of our today's wires whose contents are self explanatory and which reads as follows:

'This is to advise you that Board Directors this Company at meeting held yesterday confirmed the extension letter July, 1952. Therefore, contract remains in full force and vigor and Directors hereby request payment
415 to Bank of America on or before Wednesday, October 7, 1953 of all sums due as result your sales to date our shipment. Anticipate shipping first car around November 9, thus simultaneously payment Bank of America open letter credit to cover this first shipment stating market price all sizes accordance our contract.'

"We thus await the payment as requested and you must fully realize that the retention by you of funds due us has caused so far grave damage to our Company and any further delay result in our financial failure. Very truly yours

Refrigeradora Del Noroeste, S. A."

First car around October 9.

Mr. Kohn: Yes.

By Mr. Clayton:

Q. Now, when you received this letter, Plaintiff's Exhibit 12 that I had just read to the jury—first, I will ask this:

You had been receiving some shipments of shrimp during this exchange of communications, had you not, sir?

A. Yes, sir.

Q. Do you recall now when the last shipment was
416 received by you?

A. No, I don't. It was June or July.

Q. Now, at the time that you received this letter, Plaintiff's Exhibit 12, had the cars which had been sent you during this interim been sold out?

A. No, sir.

Q. And did I understand you correctly to say what your practice had been—

Mr. Kohn: If the Court please, this question has come up several times before and Defendant's counsel insists

on evading the ruling that such matters are inadmissible on the grounds that the contract governs.

The Court: I have not heard his present question. You interrupted him half-way. Are you referring to the former question?

Mr. Kohn: No, the present one.

The Court: I can't rule on it. I have not heard it.

Mr. Kohn: I thought he completed it.

Mr. Clayton: I will withdraw it, Judge. I was merely going to ask him about a practice under the contract.

The Court: Very well.

Mr. Clayton: I will withdraw it.

417 By Mr. Clayton:

Q. You say that the cars that you had received during this exchange of communications had not been completely sold out?

A. Yes, sir.

Q. Now, after you received this letter with respect to their anticipating sending the car around October 9, and for you to furnish them a letter of credit, what if anything did you do?

A. I opened two letters of credit and sent them a wire.

The Court: We will take a recess of 10 minutes.

(A recess taken.)

418 Mr. Clayton: Mark these documents, please, Defendant's Exhibits Nos. 39 to 40, inclusive.

(Documents so marked.)

The Court: You may proceed, Mr. Clayton.

By Mr. Clayton:

Q. Mr. Appelbaum, after you had received the communication which was just read to the jury and referred to as Plaintiff's Exhibit 12, did you do anything with respect to opening letters of credit?

A. I did.

Q. How many letters of credit did you open?

A. Two.

Q. I show you Defendant's Exhibits 39 and 40, for identification, and ask you whether or not those appear to be photostatic copies of letters of credit which you opened—

A. They are.

Q. (Continuing.) —pursuant to the communication which you received and which has been referred to as Plaintiff's Exhibit 12?

A. They are.

Q. Without reading them, can you tell the Court and jury the amount of each of the letters—

I am sorry.

419 Mr. Clayton: At this time, your Honor I move that Defendant's Exhibits 39 and 40 for identification, be admitted into evidence.

Mr. Kohn: If the Court please, I have to object to the admission in evidence of the letters of credit. They will merely clutter up the record. They do not pertain to any of the issues in the case. The method of financing under the contract was optional. We are making no issue about him having opened up letters of credit.

We admit that they were opened up and on the dates indicated, but the amounts, details and the conditions are immaterial and will serve no purpose.

Mr. Clayton: I was not attempting to get the terms. I merely wanted to show, your Honor, that the defendant had done everything that they had requested.

Mr. Kohn: We will admit that he opened letters of credit, but we object to the admission of the documents.

420 The Court: All you want the jury to know is the amount of them, so why don't you stipulate to the amount?

Mr. Kohn: That is O. K.

The Court: The letters of credit are in the sum of $30,000; that is there are two letters of credit in the sum of $30,000 that were opened. It is so agreed.

Withdraw your objection then.

Mr. Kohn: Give the dates.

By Mr. Clayton:

Q. What are the dates of the letters of credit?

The Court: Yes, you may read those.

Mr. Clayton: Yes, sir. October 6, 1953, and each are in the amount of $30,000.00.

By Mr. Clayton:

Q. Now, after you had received Plaintiff's Exhibit 12, and after having obtained the two letters of credit that we have just mentioned, did you communicate with the plaintiff?

A. I did.

Q. I show you Plaintiff's Exhibit 13 which purports to be a copy of the Western Union telegram dated October 6, 1953, from Penguin Frozen Foods to the plaintiff.

I will ask you, did you send the original of that
421 telegram to the plaintiff?

A. I did.

The Court: What is that exhibit again?

Mr. Clayton: Plaintiff's Exhibit 13.

The Court: Thank you.

Mr. Clayton: With the permission of the Court, I will read this to the jury.

The Court: Yes.

Mr. Clayton: This is a Western Union telegram dated October 6, 1953, to Refrigeradora del Noroeste. The telegram is as follows (Reading):

"Gratifying at long last to have you acknowledge your responsibility under our contract together with statement of your intention to perform.

"Inasmuch as you specify use of letters of credit assume you are returning to seven per cent commission arrangement.

"All this quite agreeable.

"However, in light of my recent experiences I am entitled to adequate security for your performance.

422 "Puzzled by your direction of only one letter of credit when heretofore you have requested five or more at the opening of season. Nevertheless, letter credit opened at following prices."

And then he gives the price the letters of credit were opened at, referring to the letters of credit which have just been mentioned here in evidence.

By Mr. Clayton:

Q. Now, after you had sent to the plaintiff the document that was just read, did you receive a reply?

A. I did.

Q. I show you, sir, Plaintiff's Exhibit 14 which purports to be a copy of a Western Union telegram dated October 7, addressed to Penguin Frozen Foods from the plaintiff, and ask you to look at it and state whether or not you received the original of that document?

A. I did.

Mr. Clayton: This is a telegram dated October 7 addressed to Penguin Frozen Foods at 120 So. La Salle St., Chicago. (Reading):

"Commercial relations renewed under original con-
423 tract and extension. Your cable omits confirmation that required payment according to our previous cable has been made. We categorically demand it."

And it is signed, "Refrigeradora del Noroeste."

By Mr. Clayton:

Q. After you had received that communication, did you communicate with them later?

A. I did.

Q. I show you document referred to as Plaintiff's Exhibit 15, which purports to be a copy of a Western Union telegram dated October 8, 1953, addressed to the plaintiff by Penguin Frozen Foods, and ask you to look at that and state whether the original of that document was sent by you?

A. It was.

The Court: Plaintiff's Exhibit?

Mr. Clayton: 15.

This is a Western Union telegram dated October 8, 1953, to Refrigeradora del Noroeste, and it is as follows:

"We will continue to remit for cars as completely sold out in accordance with past practices so long as you
424 live up to your agreement."

It is signed, "Henry Appelbaum, Penguin Frozen Foods."

425 By Mr. Clayton:

Q. Now, after having sent the communication to them, did you receive a response?

A. I think I did.

Q. Now, I show you, sir, Plaintiff's Exhibit 13, which purports to be a telegram to the Penguin Frozen Foods dated October 21, and ask you to look at it and state whether or not you received the original of that document?

A. I did.

Mr. Clayton: I will correct the date to October 20. I understand on the original it is October 20.

By Mr. Clayton:

Q. Now, after having received the communication in question, did you send a reply?

A. I did.

Q. I show you, sir, a document referred to as Defendant's Exhibit 3 for identification, and ask you to look at that, it purporting to be a telegram dated October 21, 1953, and ask you whether or not you sent the original of that document to the Plaintiff?

A. I did.

Mr. Clayton: I move that the Defendant's Exhibit 3 for identification be admitted in evidence, your Honor.

426 The Court: It may be received.

(Said document marked DEFENDANT'S EXHIBIT 3 was received in evidence.)

Mr. Clayton: This is a telegram to the Refrigeradora Del Noroeste, S. A. (Reading):

"Your wire October 20 received. Not at all surprised as place no reliance whatever in your promises to ship. Your entire conduct since February 25, 1953 proves conclusively that your continuous objective has been to evade the obligations of our contract. Our counsel advise us that we are now entitled to bring suit against you."

It is signed, "Henry Appelbaum, Penguin Frozen Foods."

By Mr. Clayton:

Q. Now, sir, after having sent that wire to them, do you recall whether or not you received a reply?

A. I don't think so. I don't remember.

Q. Getting back to the new Importing Company—the Crest Importing Company—I asked you, I think, this morning when you first learned of the formation of that Company. Do you recall that?

A. There were rumors—I first heard of it at the National Fisheries Institute convention in Washington,

427 which was in April, 1953.

Q. Now, after the exchange of telegrams beginning February 25, 1953, I think you told us that you continued to receive shipments from the Plaintiff?

A. Yes, sir.

Q. Now, did you continue to attempt to sell or dispose of those shrimp?

A. We did.

Q. Did you receive any communication from any of your customers concerning the shrimp which they sent you after the first communication that you received from them in which they stated they were terminating their contract?

A. We received several communications from our customers that they heard rumors.

Q. Did you receive any communication from any of

your customers concerning the shrimp which you had sold them?

A. Yes, we received communications from customers complaining about the—

Mr. Kohn: If the Court please, I want to move to strike the answer on the grounds that any statement of a third party would be hearsay as far as the Plaintiff is concerned.

The Court: The objection is sustained.

428 By Mr. Clayton:

Q. You said that you did receive communications from some of your customers concerning—

Mr. Kohn: Mr. Clayton, did you hear the Court's ruling? Your back was turned. I objected.

Mr. Clayton: I am not asking him what was said. I am merely asking him whether there was or whether it was a fact he received—

The Court: He already answered that he had.

Mr. Clayton: Yes, sir.

Now, mark these Defendant's Exhibits 41 to 44, please. (Documents so marked.)

By Mr. Clayton:

Q. I show you plaintiff's Exhibits 41, 42, 43, and 44, inclusive, for identification, which purport to be letters which had been sent to you.

I will ask you to look at these documents and state whether or not you received them, received the originals of the copies that you are now looking at?

A. Three of them are originals, and one is a copy of a letter sent to the home office of the A&P Company.

Mr. Kohn: If the Court please, these documents were not submitted in accordance with your ruling after 429 the pre-trial conference.

The Court: Are you offering them?

Mr. Clayton: I am going to, yes.

Mr. Kohn: I have not seen the originals of these. Had I seen them, I would be glad to admit the authenticity, but as far as—

Mr. Sprecher: Mr. Kohn, I submitted those to you at our deposition with Mr. Pinson in May of —

Mr. Kohn: The original?

Mr. Sprecher: Yes. I showed the originals. These are not communications between Reno and Penguin so I did not submit them to you to attest to their genuineness but we have given you copies on two occasions.

Mr. Kohn: I know you have given me copies. My only point is I have not seen the originals.

The Court: There is nothing before me now.

Proceed.

Mr. Clayton: Now, at this time, your Honor, I will offer Defendant's Exhibits 41, 42, 43, and 44 into evidence, and move that they be admitted.

The Court: Is there any objection?

430 Mr. Kohn: Mr. Sprecher has shown me the originals. Therefore, I withdraw my objection as to their authenticity, but I reaffirm my objection on the grounds of relevancy and materiality. They are statements of a third person.

In addition, under the contract of October 19, 1950, the terms of which were re-adopted in the extension agreement, there is nothing that requires any particular quality of shrimp, so any complaints as to quality would certainly be inadmissible.

The Court: Is there anything you want to say?

Mr. Clayton: Yes, sir, your Honor.

If you recall, when Mr. Pinson was testifying, counsel for the Plaintiff asked him specifically whether or not there had been any complaints concerning defective shrimp.

The Court: By the Defendant Appelbaum?

Mr. Clayton: Yes, sir.

The Court: He answered to that. You can ask the Defendant Appelbaum if he made any complaint.

431 As I read these, these are hearsay of the worse kind. Furthermore, I don't say that this was done, but to prove the importance of the hearsay Rule, it would be a simple matter for Mr. Appelbaum, with a friendly customer, to say, "Write me a few of these."

This is why we have the hearsay Rule. I think these letters clearly fall within it and are certainly not admissible in evidence.

By Mr. Clayton:

Q. Mr. Appelbaum, did you at any time make any complaints concerning defective shrimp to the Plaintiff?

A. We did.

Mr. Kohn: I want to move to strike the answer. The contract called for compliance with the Pure Food Law.

The Court: In view of the questions asked Mr. Pinson on the stand, he has a right to go into the same question of conversation, if any. He was asked whether or not he received any complaints on the shrimp from Mr. Appelbaum. He said that he did not. This man has a right to ask Mr. Appelbaum now whether or not he sent any.

432 The jury can decide which one is telling the truth, if either one.

Mr. Kohn: But the Court will decide if it is material?

The Court: That is right. It would not have been if you did not ask Mr. Pinson the other question. You opened it up. Now, I cannot close it.

Mr. Clayton: Will you mark these as Defendant's Exhibits 45 through 50?

(Documents so marked.)

433 Mr. Kohn: If the Court please, Mr. O'Brien—who has a better memory than I—reminds me that my question related only to the Pure Food and Drug law.

The Court: Where is it? Read it to me.

Mr. O'Brien: There were two questions asked. The first one was on page 89.

The Court: Read it.

Mr. O'Brien: (Reading.)

"Q. Do you know whether or not any of the shrimps sold by your company to the defendant during the three seasons were rejected by the Mexican or American authorities under either the Pure Foods laws or comparable laws in the respective countries?

"A. No, sir.

"Q. Do you know whether or not during those three seasons the defendant ever claimed that any of the shrimp shipped to him did not comply with those laws?

"A. Not that I recall, sir."

The Court: Very good.

434 Confine yourself within the same limits, Mr. Clayton.

Mr. Clayton: All right, your Honor.

The Court: You heard the ruling, Mr. Clayton?

Mr. Clayton: Yes, sir.

The Court: Inasmuch as you are limited to the Pure Food and Drug Law, we are not interested in these complaints.

Mr. Clayton: These are some reports and a letter that are being offered for another purpose.

The Court: Well, let us hear you on this one.

Mr. Clayton: Yes, sir.

The Court: You will bring it out in another way.

By Mr. Clayton:

Q. I show you Defendant's Exhibit 45 for identification, and ask you to look at it. it purporting to be a letter on the stationery of the plaintiffs and signed by Mr. Pinson and addressed to you, and state whether or not you received the original of that letter.

I think it is dated May 4, 1953, is it not?

A. May 4, 1953, yes.

435 Q. I show you, sir, Defendant's Exhibits 46, 47, 48, 49 and 50 for identification, each of which purports to be the reports that were submitted by your company to the plaintiffs on the respective dates that they bear. I will ask you to look at those and see whether or not those documents appear to be copies of original reports which you caused to be sent to the plaintiffs for the periods designated therein?

A. They are.

Mr. Kohn: Do we have copies of all these? I have no objection subject to verification. These are very voluminous documents. I don't want to take time to look through them. I am sure they are correct.

The Court: Are you offering them in evidence?

Mr. Clayton: Yes, I offer them.

The Court: Then you have no objection?

Mr. Kohn: Subject to verification, I am sure they are accurate.

The Court: They may be received.

(Whereupon said documents marked DEFEND-
436 ANT'S EXHIBITS 46, 47, 48, 49 and 50 for identification were received in evidence.)

436 By Mr. Clayton:

Q. Mr. Appelbaum, did you have any dealings with the plaintiff concerning the breading of shrimp?

A. I did.

Q. Will you tell the Court and jury when your first dealings with them concerning the breading of shrimp took place?

A. In July, 1952.

Q. Where did you first converse with them concerning the breading of shrimp, and will you tell who was present?

A. Mr. Pinson and Mr. Saenz.

Q. Where did the conversation or conference take place?

A. At the Nacional Financiera in Mexico City.

Q. You said it was in July of what year?

A. 1952.

Q. Will you tell the jury just what was said by each of the parties, if anything, concerning the breading of shrimp?

A. We had several meetings on it at previous times before that.

437 Q. Now, can you tell us when the first meeting was?

A. About six months prior to that.

Q. Do you know where that took place?

A. All at the Nacional Financiera and at the hotel.

Mr. Kohn: You ask him first tell about the first discussion.

By the Witness:

A. The first discussion.

By Mr. Clayton:

Q. Will you tell the Jury just what was said, if anything, at this first conference which you discussed with him the breading of shrimp?

Mr. Kohn: If the Court please, I believe Mr. Clayton has failed to fix the date and who was present. He did on the Dallas conference.

By Mr. Clayton:

Q. Will you tell us the date and the place that this first conference took place?

The Court: Lay the foundation.

By the Witness:

A. It was about, about January or February of 1951.

By Mr. Clayton:

Q. And where did this conference take place?

A. At Chicago.

438 Q. And who was present?

A. Mr. Saenz, S-a-e-n-z.

Q. I don't recall. I do not want to be repetitious but did I ask you to tell the Jury who Mr. Saenz was?

A. Mr. Saenz was a member of the board of Reno and he was an official of Nacional Financiera who had charge of the operations of Reno and decided their policies. He had control of the workings of it.

Q. Now, will you tell the Jury what was said by yourself and Mr. Saenz at this first conference?

Mr. Kohn: If the Court please, I want to object to any discussions with Mr. Saenz because the evidence merely shows he was a director. As your Honor knows, a director does not participate in the active management of a concern, particularly has no authority by virtue of that office with respect to contracts. He is not an active executive and the mere fact he was an official of the Mexican RFC, referred to as N. F. certainly was removed from the necessary authority to approve the execution of a contract.

Mr. Clayton: I think he also stated, your Honor, 439 that he was an official of Reno and that he—

The Court: He said he was a director of Reno.

Mr. Clayton: And he was in charge of shaping policies and in control of the operations, with the exception of the physical shipment.

The Court: I do not recall that. If you can bring out any authority. One member of the board of directors certainly has no authority to bind the corporation. An officer has.

Mr. Clayton: This conversation that I am attempting to elicit isn't for the purpose of showing that it was binding. It is for the purpose of showing it is leading up to the—

The Court: Now, find out who Saenz is, as far as his relationship with the plaintiff corporation is concerned, and then I will hear your objection.

By Mr. Clayton:

Q. Will you tell the Court and Jury just what position Mr. Saenz held with respect to Reno and the Nacional Financiera?

A. Mr. Saenz was in charge of Reno. Mr. Pinson was taking all his orders from Mr. Saenz.

Q. What is that?

440 A. All of our transactions outside of the actual shipping of the shrimp which we took up with the plant and Mr. Pinson, anything about money matters or anything else was always taken up with Mr. Saenz at Nacional Financiera.

The Court: Is he a signatory to this contract?

Mr. Kohn: No, sir. There is no contract in writing.

The Court: There is no contract for the shipment of shrimp. He said he had all of his dealings with the plaintiff through this Saenz. If so, he should be on the contract. Let us see it. As yet no one has bothered to show me a copy of the contract. It was not attached to the pleadings either, incidentally, that I can recall. It is referred to in some of your briefs.

Mr. Kohn: Have you got an extra copy of the contract? Give him Exhibit No. 1.

The Court: I thought it was a secret from the Court.

Mr. Kohn: No. I think the Court is really entitled to it. We have an unsigned copy here.

441 Mr. Clayton: Plaintiff's Exhibit 2, I think, will take care of that.

The Court: Where is the contract?

Mr. Clayton: This is the extension agreement, Judge.

The Court: All right.

Mr. Clayton: You will see his name on there.

The Court: And the contract, too. Does anyone have a signed copy of the contract in court, the original? Mr. Kohn says this is unsigned.

Mr. Clayton: He is Plaintiff's Exhibit 1.

The Court: Let us have the original with the signatures on it. Does the name appear here, S-a-e-n-z?

Mr. Clayton: Yes, sir.

The Court: How do you spell it?

Mr. Clayton: S-a-e-n-z.

The Court: This is on Plaintiff's Exhibit 2. That is the extension of the original contract. He signs for the plaintiff corporation I see.

Mr. Kohn: That signature is rather illegible. I would like to look at it.

The Court: I do not think there is much question of
442 what it purports to be. He did not sign the original. Alcalde. He did sign the extension.

Mr. Kohn: If the Court please, this particular question relates to a period in, I think, he said 1950 or 1951. The extension agreement, if the Court please, is 1952.

The Court: Objection overruled. You may proceed.

By Mr. Clayton:

Q. Now then, will you tell the Jury just what was said and done, if anything, at this first meeting that you have just referred to?

A. Mr. Saenz asked me to figure out some way to keep the plant busy.

The Court: Speak louder. I can't hear you.

By the Witness:

A. Mr. Saenz asked me to figure out some way to keep the plant busy in their off season and when there wasn't production of shrimp with the shell on, which is known as green shrimp. We came up with the idea to bread shrimp in the plant, to fill in all the time to get the plant up to capacity so they could make more money.

By Mr. Clayton:

Q. Was there any further discussion had at that 443 time about this matter, if you can recall?

A. Not particularly, because we were just trying to figure out something.

Q. Did you later have a conference or a conversation with all of the officials concerning the breading of shrimp?

A. I did.

Q. Can you tell the Court and Jury when your next conference was, where it was, and who participated in it?

A. In July, in Mexico City in July of '52, and present at this conference was Mr. Pinson and Mr. Saenz.

Q. Will you tell the Court and Jury what was said by each of the respective parties in this conference in Mexico City in July of 1952?

A. I asked Mr. Pinson—the breading operation came up again and I asked Mr. Pinson how much shrimp he could bread at Mazatlan, at his plant.

He said at least a million pounds.

We discussed then about on what Mr. Saenz then said that the Reno Company could not finance an operation of that kind. If we could figure out a way to finance it so that they could just do the work for us then we probably could have something that would be beneficial to both Reno Company and ourselves.

444 We decided to form a Mexican Company that would finance the supplies and the material necessary for the operation of the breading of shrimp and that we would finance the shrimp from the time it was ready in the States here, we would take that obligation over and that Reno was to get four cents a package for the work, a four cents profit. They figured the overhead on it and everything. They were to make four cents a package net profit on the deal.

Q. Was anything said as to what you were to receive, and when I say "you" I am referring to Penguin Frozen Foods?

A. We were buying it at four cents over the cost of the shrimp, and breading, which we would send them from the States and the labels which we were sending to them from the States, and they figured their overhead and their plant expenses, he figured his costs to produce these things, and they were to get four cents, and we were to buy them at that price, four cents over that price. We were to buy them outright.

Q. You say that Mr. Pinson said that he could not finance the operation?

A. Mr. Saenz said.

Q. Mr. Saenz said that?

445 A. Yes.

Q. What, if anything, was said as to the method that would be used in the financing?

A. Mr. Saenz said that we would form this Mexican company to take care of the financing so that all Reno would get would be only the profits on the deal. They would have no obligation for financing.

Q. I think you told us that was in July, 1952?

A. That is right.

Q. Now, after that conference was the Mexican company formed?

A. It was.

Q. What was the name of the Mexican company that was formed pursuant to this agreement that was discussed in this conference?

A. I would have to refer to the name because I can't pronounce it.

The Court: Spell it, if you know. Give it to him. Do you have it there?

By Mr. Clayton:

Q. Exportadores and Importadores?

A. That is right.
Q. Is that right?
A. That is right.

446 By the Court:

Q. When was it formed?
A. It was formed in about August of '52.

By Mr. Clayton:

Q. And where?
A. In Mexico City.
Q. After the Mexican Company, Exportadores and Importadores was formed, did you have occasion to see or talk with Mr. Pinson or any official concerning it?
A. I did.
Q. And will you tell with whom you spoke, when and where?
A. Mr. Pinson met me in Dallas with Mr. —a man he said who would be in charge of the operation—Mr. Gavita.
Q. And what was done and said?
The Court: When, when?

By Mr. Clayton:

Q. When was that, Mr. Appelbaum?
A. It was about August or September of '52.
Q. And you say it was in Dallas, Texas?
A. Right.
Q. What was done at that meeting?
A. I took him through a breading plant in Dallas. They saw the operation. He sais, "I have seen enough. I do not need any more. Just send me the breading and—"

447 Q. May I interrupt you? When you say "he," will you state—

A. Mr. Pinson.
Q. Mr. Pinson?
A. Yes. I took Mr. Pinson and Mr. Gavita through this breading plant in Dallas, and we spent a half an hour or an hour in the plant, and after that Mr. Pinson says, "I know what it is all about now. We are ready to go ahead. Get me the breading and get me the deveining machine, and I will get the cartons. There is a lot of cartons down there that I can buy. I will buy the cartons for the company. And we can go ahead and produce them."

Mr. Clayton: I would like to have this marked as Defendant's Exhibit 51.

(Said document was marked as requested.)

By the Witness:

A. We also sat down and he figured up the exact cost of his overhead and everything else and we arrived at a price.

By Mr. Clayton:

Q. Now, this figuring out of the cost and the overhead was done by whom?

A. Mr. Pinson.

448 Q. When you say "Mr. Pinson figured out the cost and so forth," did you notice what he was writing on, Mr. Appelbaum?

A. He was writing on a piece of brown paper.

Q. A piece of brown paper?

A. I think so.

Q. I show you Defendant's Exhibit 51 for identification and ask you to look at that and state whether or not the figuring and writing on the photostatic copy which you hold in your hand appears to be the figures and writing which was done by Mr. Pinson on a brown piece of paper at the time that you have just related?

A. It is.

Mr. Kohn: Are you offering that?

Mr. Clayton: Yes, sir.

Mr. Kohn: What is the number of this document?

Mr. Clayton: 51, Defendant's Exhibit 51 for identification.

Mr. Kohn: If the Court please, the counterclaim in this case, in so far as this breading contract was concerned, is alleged to be based on an oral contract. It is my understanding of the law that a contract alleged to be an oral contract cannot be proven in this manner, partly oral
449 and partly written. And I therefore object.

Furthermore, there is no evidence to show as required under the Mexican law that—on which I am no expert—but I am advised, authorizing—

The Court: No expert. It is an understatement. I do not know anything about it.

Mr. Kohn: I will join in that statement. As far as I am concerned, showing that that was authorized by the board of directors.

Mr. Clayton: Your Honor,—

Mr. Kohn: If that is his theory of this—

The Court: You are not offering this as a contract?

Mr. Clayton: No, sir. I am merely offering as cor-

roborative of the meeting and what transpired, not of any contract, merely as corroborative.

The Court: Well, you stated that they were figuring of prices. He introduces here—

Mr. Clayton: I will submit to your Honor the original.

The Court: —a piece of paper with a lot of fig-
450 ures and some writing on it. He may certainly use it to refresh his recollection. I don't think it is of any value.

Mr. Kohn: I have no objection to it.

The Court: I don't think it is of any value at all as a document. I see no reason for receiving it in evidence.

Mr. Kohn: I have no objection for that limited use.

The Court: I can read the photograph easier than I can this.

Mr. Kohn: If the Court please, all the documents that they have gone through in this case, or rather papers, I think they could find some better stationery.

Mr. Clayton: That was what he was using.

The Court: He did not buy it, Mr. Clayton. It is the other fellow's.

Mr. Clayton: It was his own, figuring that out.

The Court: I don't think it is of any value as an exhibit and it will not be received, but I have no objection to his using it to refresh his recollection if he desires to do that.

451 By Mr. Clayton:

Q. I have shown you defendant's Exhibit 51 for identification, which you looked at, did you not?

A. Yes, sir.

Q. And after looking at that, does it refresh your recollection, sir, as to the figuring with respect to overhead and costs which Mr. Pinson did at the meeting that you have just referred to?

A. Yes, sir.

Q. You mentioned some deveining machine. Now, what, if anything, did you do with respect to those?

A. We bought a machine in California and shipped it to him.

Q. What?

A. We bought a deveining machine in California and shipped it to him.

The Court: When? I would like dates on all of this.

By Mr. Clayton:

Q. When did you purchase the deveining machine?

The Court: What is your answer?

Mr. Kohn: If the Court please, I want to object. I want to object to any further questions along this line
452 on the ground that what Counsel is trying to do is to show a preliminary operation or performance before the actual contract started, and under the Illinois authorities that is inadmissible.

The Court: Before I can rule intelligently on it I will have to see what it is. I will have to see what it is. Right now your objection is overruled, without prejudice to your restating your position until I hear the rest of it. Now, he has not answered the question.

By the Court:

Q. Answer it.

A. I don't remember the date.

Q. The question is when did you buy this deveining machine?

A. I don't remember the exact date.

The Court: Oh, all right. Go ahead, Mr. Clayton.

Mr. Clayton: Will you mark this as Defendant's Exhibit 52 for identification?

(Said document was marked as requested.)

The Court: As you take up various things, establish a time, will you?

Mr. Clayton: Yes.

453 The Court: You have not done it, and each time I have to interrupt you to say when.

Mr. Clayton: Yes.

By Mr. Clayton:

Q. I show you, sir, Defendant's Exhibit 52 for identification and ask you to look at that and just state whether that refreshes your recollection as to when you purchased that deveining machine?

A. In January or February.

Mr. Kohn: If the Court please—

Mr. Clayton: He has to answer it first yes or no.

By the Witness:

A. Yes, I do.

Mr. Kohn: If the Court please, I move to strike all matters relating to these preliminary items before the

alleged actual performance of the contract. Under the Illinois authorities relating to statements such items do not—

The Court: The same ruling as before. I will hear you at length on it after I find out what I am ruling on. I can't do it now.

By Mr. Clayton:

Q. Now, after you purchased in January of 1953
454 the deveining machine, was that caused to be sent to where?

A. It was sent to the Reno plant at Mazatlan.

Mr. Kohn: The same objection and same motion.

The Court: Yes. I will let your objection stand to the entire line of questioning so that you will not have to interrupt. It is overruled without prejudice to your right to renew it. Go ahead, Mr. Clayton.

By Mr. Clayton:

Q. Now, what else did you cause to be sent to them after you had this conference that you just referred to?

A. Labels, boxes and a carload of breading.

Mr. Clayton: Will you mark these as Defendant's Exhibits Nos. 53 to 71?

(Said documents were marked as requested.)

The Court: Can't you fellows shuffle those around at noon hour?

Mr. Kohn: We have them here.

The Court: And then do something else, shuffle these, when we are eating.

Mr. Clayton: If it is agreeable with your Honor, I would like to introduce in evidence the answers to the interrogatories propounded to the defendant and we
455 could stop with this defendant here and if they are admitted—

The Court: Straighten out your documents over the noon hour.

Mr. Kohn: Yes, including the answers. Some of them may not be material.

The Court: I will hear your objections.

Mr. Kohn: Yes.

The Court: Do you want to do it now and then let this witness resume at two o'clock?

Mr. Clayton: Yes, sir.

The Court: You straighten out the papers in the mean-

while. You are excused temporarily from the stand. Go ahead with the interrogatories.

(Witness excused.)

Mr. Clayton: At this time, your Honor, we want to—

The Court: The original is on file I take it?

Mr. Clayton: Yes.

The Court: Go ahead.

Mr. Clayton: Defendant's Exhibit 72, I wish you would mark this.

(Said document was marked as requested.)

456 Mr. Clayton: At this time, your Honor, we offer in evidence Defendant's Exhibit 72, being the interrogatories propounded by the defendant to the plaintiff under Rule 33 and the answers made to the respective questions.

The Court: I have ruled on some of these prior to the trial, haven't I?

Mr. Clayton: Yes, sir.

The Court: And you are reading only those answers, of course, that I ordered answered?

Mr. Clayton: Yes.

The Court: Then if there is any objection as to materiality, I will hear it at this time.

Mr. Clayton: All right.

The Court: As you read it, read just the question and the answer.

Mr. Clayton: If it is agreeable may I not—

The Court: Surely.

Mr. Clayton: —have Counsel do that?

The Court: Yes.

457 Mr. Sprecher: Interrogatory No. 1 (Reading):

"How many pounds of shrimp of all kinds and qualities classified according to size, grade and other classification, were caught or purchased and packed and frozen by Refrigeradora del Noroeste during the period since Car PFE 7754 was shipped to Penguin Frozen Foods on or about July 30, 1953, up to and including August 15, 1954?"

The answer is:

"Reno froze, from July 30, 1953 to August 15, 1954, 715,585.673 kilos, which were classified as shown in Exhibit "A"."

Mr. Kohn: I have no objection.

Mr. Sprecher: I won't read the exhibit.

Mr. Kohn: No.

Mr. Sprecher: Interrogatory No. 2 (Reading):

"How many pounds, if any, of the shrimp described in Interrogatory 1, classified according to size, grade and other classification, were processed by Refrigeradora del Noroeste, but not owned by Refrigeradora del Noroeste?"

The answer to that is:

458 "Reno toll-packed during the aforementioned period 224,113.705 kilos, classified as shown in Exhibit "B"."

Interrogatory No. 3 (Reading):

"How many pounds, if any, of the shrimp described in Interrogatory 1, classified according to size, grade and other classification, were sold by Refrigeradora del Noroeste, for consumption in the Republic of Mexico?"

The answer:

"Reno sold its total production in Mexico. Classification as shown on Exhibit "C"."

I will read Exhibit "C"—begging to read it in any event.

No, we will not read Exhibit "C." It shows that—

The Court: The jury and I both thank you.

Mr. Kohn: I will join in that.

Mr. Sprecher: It shows the number of pounds according to classification.

Interrogatory 4 (Reading):

"How many pounds of the shrimp described in Interrogatory 1 less the pounds of shrimp, if any, described
459 in Interrogatories 2 and 3, classified according to size, grade, and other classifications, have been sold; how many pounds classified according to size, grade and other classifications, have been consigned; how many pounds, classified according to size, grade and other classifications, have been delivered upon trust receipt; and how many pounds, classified according to size, grade and other classification, have been disposed of in any other method, describing such method?"

The answer is:

"Refer to reply No. 3."

The Court: That is in that same—

Mr. Sprecher: No. 3 stated that Reno sold its total production.

Interrogatory No. 5 (Reading):

"What are the names and addresses of all the persons

to whom the shrimp described in Interrogatory 1 has been sold or disposed of by consignment, delivery upon trust receipt or other method, and how many pounds classified according to size, grade and other classification have
460 been disposed of to each such person and by what method?"

The answer is:

"Reno sold, in Mexico, its total production to those persons and companies listed on Exhibit 'D'."

Exhibit "D" shows a total amount sold of 491,471.968 kilograms. It begins with the name, "Exportadores Associados, S. A., domiciled in San Juan, Letran 21-909-Mexico, with the amount 486,306.371 kilos, and then there is a—

The Court: Would it be fair to roughly say of a total amount sold of 491,471 kilograms, 486,306 of those were sold to Exportadores Associados?

Mr. Sprecher: Correct.

The Court: Is that a fair summary of it?

Mr. Sprecher: That's it, your Honor.

The Court: You agree?

Mr. Sprecher: Right.

Interrogatory No. 6 (Reading):

"How many pounds of the shrimp described in Interrogatory 4, classified according to size, grade and other classification, have been resold or otherwise disposed of by the persons named in the answer to Interrogatory 5 and at what price or prices?"

461 The answer is:

"As explained in reply No. 5, Reno sold its total production in Mexico. It is obvious that the buyers prices and volume of stocks, or on anything else, are outside its direct control. In order to obtain the information requested, Reno would have to inquire it from the various buyers shown in Exhibit 'D', and cannot foresee their willingness to submit it."

Interrogatory No. 7 (Reading):

"How many pounds of the shrimp described in Interrogatory 4, classified according to size, grade and other classification, remain unsold or undisposed of by the persons named in the answer to Interrogatory 5, what sale or resale price or prices were billed or invoiced by Refrigeradora del Noroeste, in regard to all such pounds, and what is the current market price for each such size, grade and classification?"

The answer is:

"As of August 15th, 1954, Reno's total production had been sold.

462 "Reno feels the price or prices for which it sold its production are inconsequential, and that its revelation would be detrimental to its business.

"Furthermore, Henry Appelbaum and/or Penguin Frozen Foods being in the shrimp business, they should be well acquainted with the current market prices."

Interrogatory No. 8 (Reading):

463 "Did Pedro Pinson and Oscar Fraustro, Directors of Refrigeradora Del Noroeste, or either of them, receive a copy of the letter attached to these interrogatories as Exhibit 'A' and if so, when?"

Your Honor, this letter which is attached to the interrogatories as an Exhibit "A" has also been identified as Defendant's Exhibit No. 12.

The Court: Very well.

Mr. Sprecher: But, it has not been received into evidence. We would like to read it at this time.

The Court: Finish reading the answer to the interrogatory.

Mr. Sprecher: All right, your Honor.

Mr. Kohn: If the Court please, I move to strike—

I want to make a statement, rather. Mr. Sprecher read from the first answer to the interrogatories, and not really the official answer.

The Court: There is only one answer.

Mr. Kohn: There were two documents. I think the latter one covers it, if I am not mistaken.

The Court: I followed him. This answer to No. 7 in the second series says, "Reno replies with the contents of reply No. 6." That you already read.

464 Mr. Kohn: Your Honor had ruled that Reno did not have to give their prices.

The Court: Now, we are getting to No. 8. Let him read the answer to that first. He referred to that.

Mr. Sprecher: The answer to that was:

"The letter in question was dated September 11, 1953, and was addressed to Mr. Martinez Ostos, with copies sent to Messrs. Fraustro and Pinson. However, there were some differences between the original and the copy presented."

Now, Defendant's Exhibit 12 is a copy which Mr. Willis had given us in response—

The Court: You are offering it now?

Mr. Sprecher: We are now offering it.

The Court: Is there any objection?

Mr. Kohn: There is no objection.

The Court: It may be received.

(DEFENDANT'S EXHIBIT NO. 12 was received in evidence.)

The Court: Go on with your next interrogatory.

Mr. Sprecher: May I read Exhibit No. 12?

The Court: Finish your interrogatories first and we will get to that.

Mr. Sprecher: All right. Interrogatory No. 9 is:

465 (Reading) "What is the exact legal relationship between Refrigeradora Del Noroeste and Nacional Financiera?"

The answer is:

"Nacional Financiera, S.A., is a Mexican government investment bank. As such, it is the largest investment bank in Mexico, and has intervened and intervenes in the solution of the long term financing aspects of most of the country's industrial concerns. That is exactly the case with Reno. Nacional Financiera, S.A., has supplied most of the financing it has required; it acts as the Fiduciary Agent in accordance with Mexican laws, on Reno's mortgage bonds issue and, as such, represents legally the holders of said mortgage bonds. The Reno's Board of Directors, two out of its five members, are officers of Nacional Financiera, S.A.,"

And then interrogatory No. 10:

(Reading) "Who were the Directors of Refrigeradora Del Noroeste on October 19, 1950, and who are the Directors at the present, showing the dates and names of all intervening changes?"

And then the answer is:

"In October 19, 1950, the Directors of Reno

466 were:

Francisco Alcalde, Jose Saenz, Ricardo Torres Gaytan, Oscar Fraustro, Pedro L. Pinson, Alfredo Gutierrez (Commissary), Arsenio Farrell (Secretary).

At the present date, the Directors are:

Oscar Fraustro, Manuel Alvarado, Ricardo Torres Gaytan, Leonardo Alvarez, Francisco Alcalde (Deceased).

Tirso Carpizo (Commissary), Enrique Asunsolo (Secretary).

The new Board was elected on October 16, 1953."

The Court: This includes your interrogatories, does it not?

Mr. Sprecher: Yes.

The Court: All right. How long is the letter you want to read?

Mr. Sprecher: It is about a page and a half.

The Court: We will read it after lunch.

We will recess until 2 o'clock.

(Whereupon a recess was taken until 2 o'clock p.m., the afternoon being Friday, June 10, 1955.)

467 Before Judge Campbell and a jury, Friday, June 10, 1955, at 2:00 p.m.

Court convened pursuant to a recess.

Present:

Mr. Louis A. Kohn, Mr. Patrick O'Brien appeared on behalf of the plaintiff;

Mr. Robert A. Sprecher and Mr. Joseph Clayton appeared on behalf of the defendant.

468 (The following proceedings were had in the presence and hearing of the jury.)

The Court: Do you want to read the letter first or do you want the witness to resume the stand? Why don't you finish with the letter you were going to read, and the defense will proceed. Go ahead Mr. Clayton.

Mr. Clayton: We will read to you a letter.

Mr. Kohn: The Exhibit number then.

Mr. Clayton: Defendant's Exhibit No. 12. Dated September 11, 1953.

The Court: You have to speak loud if you want this to get into the record.

Mr. Clayton: (Reading)

"Lic. Raul Martinez-Ostos
Nacional Financiera, S. A.
V. Carranza 25
Mexico City, Mexico

cc Messrs. Oscar Fraustro
Pedro L. Pinson

"Gentlemen:

I think it wise to give you a report on the progress made in the organization of Crest Importing Company.

Naturally, all other phases of the organization are secondary to the marketing and merchandising program. For the past week, I have been in Chicago endeavoring to
469 set up outlets for distribution so that when the new season commences we will be fully prepared. To prevent a lengthy trip through the United States, I asked all of the buyers and sub-brokers with whom I intend to work, to meet me in Chicago. Our program is now well established and I anticipate no difficulty in the marketing of our product.

"I would like to explain the function of the sub-broker. The sub-broker, in effect, acts as one of our employees selling at our direction and at prices set by ourselves. He is paid a commission of 2½%, invoices the merchandise, and guarantees the credit of all his sales. I have found that it is usually cheaper to work through a sub-broker than to maintain salesmen in each major market. The sub-broker, at the same time he is selling our product, is selling other commodities. Accordingly, he would have a distinct advantage over us should we elect at first to use our own salesmen.

"We will have arrangements in some areas where we will sell direct, and not use a broker. However, in those instances, a large distributor must be given a prefer-
470 ential price, usually to the normal sub-brokerage. It is obvious that a distributor will not pay $20,000 to $30,000 for a whole car, and pay the same price that the small buyer pays for five to ten cases. With the present high prices, it is very difficult to find anyone who will buy in large quantities, most buyers preferring to buy in small quantities instead of tying up considerable money in inventory.

"I do not believe it possible for anyone to sell properly by 'phone throughout the whole country, and know that the carrying of spot stocks in key areas, with sales at premium prices by the sub-broker is the most efficient method and the most profitable for the producer.

"Now, frankly, I am quite concerned and disturbed to find there is a possibility that the contract of Refrigeradora del Noroeste with Penguin might extend for another year.

"I know the firm is not too highly regarded in the industry and do not believe they have either the experience or contacts necessary to do a good job. For example, all of the other producers have long since been liquidated for last year's production. They did not end up at
471 the end of the year with a large unsold inventory of small sizes on a declining market, and at a time when small sizes are most abundant. Obviously, the carrying of this inventory has greatly increased your storage costs and interest charges. Of most importance, however, is the fact that all the small sizes should have been sold at prices at least ten cents a pound higher than the present market.

"I have made brokerage arrangements with highly reputable firms and know that many of them would refuse to work with that firm.

"I believe that Refrigeradora del Noroeste had a bad experience with another Chicago firm or Stamm Schulman. These gentlemen formerly worked for Morris Fisheries. The owner of Penguin also worked for Morris Fisheries prior to organizing Penguin.

"I do not know what the contractual relationship is between Reno and Penguin but, if the former contract provided for cancellation, the withholding of funds by Penguin to assure extension of the contract, seems to be very illegal and very close to blackmail. I would not be at all desirous of having this firm receive any
472 merchandise or money belonging to Crest. I feel a keen responsibility to all of you gentlemen as well as the other organizers of Crest, and am sure you can appreciate the apprehension I would have in entrusting funds or merchandise in view of Penguin's attitude on this matter.

"I do not believe Penguin would agree to confine their sales to Chicago. I am sure also that their efforts, instead of building Crest to a larger organization, would be directed towards blocking our aims and growth. I fail to see how Penguin can be anything but a great handicap, an additional expense, and a source of friction, and sincerely hope that the first year we will not be burdened with the problem of working with them in any way. I believe that relations with Penguin should be severed. If there is any assistance I can give you, I will be glad to do so.

Sincerely,

J. W. Willis."

At this time, your Honor, we move that Defendant's Exhibit 72, the answers to the interrogatories be admitted in evidence.

473 The Court: I thought I received that this morning.

Mr. Clayton: No, sir. You did not.

The Court: Very well. It may be received.

(Said document so offered and received in evidence was marked DEFENDANT'S EXHIBIT 72.)

The Court: All right. The Defendant may take the stand now and resume your examination.

Mr. Clayton: Yes.

The Court: Have you got the documents in order that you were going to ask him about?

Mr. Clayton: Yes, sir.

474 The Court: Direct examination may be resumed.

HENRY APPELBAUM, called as a witness on behalf of the defendant, having been previously duly sworn, resumed the stand, was examined and testified further as follows:

Direct Examination (Continued) by Mr. Clayton.

Q. When we took you off the stand, we were asking you about the breaded shrimp and so forth, and the shipping of certain articles, to there.

I show you, Mr. Appelbaum, Defendant's Exhibit 52 for identification, and ask you to look at that and state whether or not that is the photostatic copy of a bill that was sent by William B. Rose & Associates?

A. Yes, sir.

Q. That is dated approximately when?

A. January 31, 1953.

Q. That was in connection with what, if you recall?

A. That was in connection with our agreement to bread shrimp—for Reno to bread shrimp for us.

Q. What was sent—

475 Mr. Kohn: If the Court please, the witness inadvertently—I did not object in time—but he just stated and used the word "agreement". There is no proof of any agreement, so I move that be stricken.

The Court: Yes, that may be stricken.

Mr. Clayton: I move that Defendant's Exhibit 52 be admitted in evidence, your Honor.

Mr. Kohn: If the Court please, I object to the admission of this document.

The Court: Hand it up here.

Mr. Kohn: I note it shows merely preliminary, and incidental activity that does not prove the existence of any contract.

Mr. Clayton: I think if your Honor will note the date is subsequent to the date that the witness—

The Court: Yes, for what it is worth, it will be received in evidence. That is, subject to your right to move all of this evidence be stricken, if they fail to prove the contract.

476 Mr. Kohn: Yes.

By Mr. Clayton:

Q. I show you Defendant's Exhibit 53 for identification, and ask you to look at that document, sir?

Mr. Kohn: Would you please describe it? There are so many we would not know which one that is.

Mr. Clayton: Defendant's Exhibits 52 and 53.

Mr. Kohn: The one in Spanish?

I think we have that and know which one that is.

Do you have a translation?

Mr. Clayton: Yes, sir.

Mr. Kohn: Could we have a copy of that? I want to know what I am objecting to.

This is of the same nature as the other. I will make the same objection to it.

The Court: I thought you were going to get all of the shuffling done over the noon hour. Come on, let us move along with this. We are taking too long.

477 Mr. Clayton: Now, I say to your Honor that all of the documents pertain to the shipping, either of machinery or breading or other materials pertaining to the breading of shrimp; all he would do is identify them.

The Court: They will corroborate his testimony that he has given so far, in your opinion?

Mr. Clayton: That is right.

The Court: What are you going to do, have him identify them?

Let him identify the groups

Do you have the same objection?

Mr. Kohn: The same objection, yes.

The Court: I will receive them subject to the same right you have to strike this if they fail to prove their counterclaim.

By the Witness:

A. Yes, sir.

By Mr. Clayton:

Q. Mr. Appelbaum, having looked at these documents, could you briefly tell the Court and jury what they pertain to?

A. They pertain to the shipping of a car of breaded 478 shrimp, a deveining machine, labels, boxes—

The Court: That you described in your testimony this morning?

The Witness: That was shipped down to Mazatlan.

Mr. Kohn: If the Court please, I move to strike the answer and all questions relating to the subject matter,

because all that this evidence tends to show is relations with third parties. There is nothing to connect it with the plaintiff whatsoever. It is an attempt to prove the existence of a contract by preliminary and incidental acts which do not prove an oral contract under the law of Illinois.

The Court: As I said before, they allege an oral contract on their counterclaim.

Mr. Kohn: That is right.

The Court: I intend to hear you at length after defendant rests after his proof on the counterclaim.

I will receive these all over your objection, and subject to the motion to strike all of them, and I will hear this
479 matter intelligently when I have something before me.

Mr. Kohn: I added one additional ground that I did not make before: namely, it is not connected with the plaintiff.

The Court: Very well.

The same course of direction will be pursued on this as on the other.

What are those exhibit numbers?

Mr. Clayton: From 52 to 57, inclusive.

The Court: Very well, they are received under the same reservation as previous exhibits pertaining to this breaded shrimp operation.

(Whereupon said documents, marked DEFENDANT'S EXHIBITS 52 TO 57, inclusive, for identification, were received in evidence.)

The Court: Now on with the rest.

By Mr. Clayton:

Q. Mr. Appelbaum, getting back to this first meeting in Mexico City that you referred to in your earlier testimony, at which time Mr. Pinson and Mr. Saenz, I think you stated were there—

480 The Court: Which meeting are we talking about?

Mr. Clayton: July, 1952.

The Court: All right, go ahead.

By Mr. Clayton:

Q. I say, referring back to the meeting in Mexico City in July, 1952, at which time Mr. Pinson and Mr. Saenz were present, do you recall whether there was any other person present at that time?

A. No, I don't.

Q. Prior to that meeting, had you discussed the breading of shrimp with officers of Reno?

A. I had.

Q. Well now, specifically—

Mr. Kohn: If the Court please. Just a moment. That testimony was gone into, all the conversations. He is now repeating and going over the same territory. We had the meeting in Mexico City.

The Court: The objection is sustained.

Get on to something else.

Mr. Clayton: Yes, sir. I am going to refer to something that happened at this meeting.

481 By Mr. Clayton:

Q. Now, can you tell us how long that meeting took place in Mexico in July, 1952?

Mr. Kohn: Same objection.

By the Witness:

A. About three or four hours.

The Court: We had that this morning.

What else is there you want him to bring out about it? You covered that meeting at some length this morning.

Mr. Clayton: That is right, but at the termination of it—

The Court: Let us get on to the termination.

By Mr. Clayton:

Q. At the termination of that meeting, will you tell his Honor and jury just what took place?

A. Reno agreed to bread shrimp for us at four cents a pound, and they were to furnish all the labor necessary to do it.

Penguin agreed to furnish all the cartons and the breading, the labels, the preliminary cartons until they got started.

Otherwise, they were going—Reno was going to buy 482 them down there and charge them to Penguin.

Q. After that meeting, did you have occasion to go to Mazatlan in connection with the breading of shrimp?

A. No, not that meeting.

Q. Did you have occasion to send anyone down there?

A. Yes.

Q. Who did you send to Mazatlan?

A. Ray Jensen.

Q. Will you tell the Court and jury who Ray Jensen was?

A. Ray Jensen is a man hired by Meletio Company in St. Louis who sell breading, and he goes down to get them started to see that they pack the breaded shrimp properly.

Q. Do you know now the approximate date you sent Ray Jensen to Mazatlan?

A. It was in January or February of 1953.

Q. At the time that you sent him to Mazatlan, had the shipment of bread been sent?

A. It had.

Q. Approximately how long prior to that date?

A. Oh, about two months, because they had trouble getting permits to send it through.

Q. At the time that you sent him, that is, Ray Jensen, there, had the deveining machine been shipped?

A. It had been there.

483 Q. Did you have occasion to discuss the breading of shrimp at any subsequent time with Mr. Pinson?

A. I did.

Q. Will you tell the Court and jury when that was, where it took place, and who was present?

A. Subsequent to the time that the machine got there?

Q. Yes, sir.

A. No, it was prior to that time.

Q. Well then, prior to the time that the machine was shipped, when did you discuss it with Mr. Pinson?

A. Mr. Pinson met me in Dallas, Texas.

Q. That was the meeting that you referred to at the last hearing?

A. That is right.

Q. Will you tell the Court and jury what you paid for this breading that was sent?

A. For the breading it was I think, the bill was $3,100. and some odd amount.

Q. What was paid for the deveining machine, if you recall?

A. $149.00.

Q. For the cartons and so forth that were purchased, how much did you pay for those?

A. They were purchased at different times. We
484 have bills on them. I don't remember the amounts.

Q. Do you recall the approximate total amount that you spent for the cartons and labels, and so forth?

A. No, I don't, unless I refer to that listing.

Mr. Kohn: We have that in our Exhibit No. 18 or 19, that amount.

By Mr. Clayton:

Q. With respect to this Exportadores, the Mexican company that was organized to finance the breading of shrimp, did you invest any money in that?

A. I did.

Q. What was the amount?

A. About $7,000.00.

The Court: How much?

The Witness: $7,000.00.

485 By Mr. Clayton:

Q. You stated in your testimony, did you not, sir, that Reno was to bread for you a million pounds of shrimp the first year?

A. Mr. Pinson said it would be a minimum of a million pounds.

Q. What would you receive from the sale of the million pounds of breaded shrimp?

A. We would make on the breaded shrimp about ten cents a pound.

Q. On a million pounds that would amount to what?

A. $100,000.

Mr. Kohn: If the Court please, I object to those answers, and move that they be stricken on the ground those are mere estimates and opinions, and there has been no sufficient foundation made leading up to the conclusion.

The Court: The objection is sustained. The question and answer may be stricken.

Computations are not evidence. This Jury can do their own computations if it becomes necessary.

By Mr. Clayton:

Q. In connection with the cartons that were being
486 purchased for the breading of shrimp, were you charged for any cartons that Mr. Pinson purchased?

A. The Mexican Company also was charged for $9,000 worth of cartons that Mr. Pinson purchased.

Q. During the conversation that you had in Mexico in July, 1952, with Mr. Pinson and Mr. Saenz, was anything further said concerning the duration of this agreement?

Mr. Kohn: If the Court please, Counsel has already asked about that conversation.

The Court: Which one are we talking about now, the one in Mexico City or Dallas?

Mr. Clayton: Mexico City. I am merely asking him if anything was said about the duration of the contract at that time.

The Court: He may answer.

By the Witness:

A. The contract for the breaded shrimp was to run as long as we were getting green shrimp from Reno, and if the contract on the green shrimp, where it was renewed, that we would go on with the breaded shrimp until such time as we discontinued relations.

Mr. Kohn: If the Court please, I don't know of any contract in evidence in this case involving green shrimp. Unless you mean Plaintiff's Exhibit—

487 Mr. Clayton: I will clarify that.

Mr. Kohn: I move to strike that.

The Court: I assume what he is stating is a conversation.

Mr. Clayton: Yes, sir.

The Court: Better bring out the conversation then, rather than a conclusion. The conclusion may be stricken. The last answer is stricken.

By Mr. Clayton:

Q. Will you tell us, Mr. Appelbaum, just what was said concerning the duration of the contract?

The Court: And who said.

By Mr. Clayton:

Q. And who said it?

A. Mr. Saenz said they will bread shrimp for us as long as we had an agreement—the length of the extended agreement on our original contract. And, if that was renewed, at the end of that time, we would go right on with the breaded shrimp.

Mr. Kohn: Will the Reporter read the last question, please?

The Court: She may.

(Record read.)

488 The Court: Proceed, Mr. Clayton.

By Mr. Clayton:

Q. Now, Mr. Appelbaum, getting away from the breaded shrimp and referring to the contract and the attempted

cancellation, there are a few questions I omitted to ask you about.

Getting back to that incident, I think you told us that you received your last shipment when?

A. Oh, of green shrimp?

Q. Yes, sir.

A. I believe it was sometime in July.

Q. Of what year?

A. Of 1953.

Q. Now, not having received that subsequent shipment or shipments, what effect did that have upon the customers that you were servicing?

A. You mean in 1953?

Mr. Kohn: If the Court please, I want to object to that question on the grounds that it is vague and general.

The Court: It is sustained.

By Mr. Clayton:

Q. This agreement that you had with Reno. I understood you to say you received no shipment subsequent to July of 1953.

489 A. That is correct.

Q. Now, did you have commitments with customers to furnish them with Reno shrimp during the next season?

A. I—

Mr. Kohn: The same objection. I want to object to that question on the ground that the word "commitment" is vague and indefinite. I think he should be more specific.

The Court: Sustained.

Mr. Clayton: I will rephrase it.

By Mr. Clayton:

Q. Did you have an agreement whereby you were supposed to furnish Reno shrimp to any customers during the next season?

A. We did.

Q. Were you able to furnish them with Reno shrimp during the next season?

A. We were not.

Q. As the result of your not being able to furnish the customers with Reno shrimp during the next season, what happened, if anything, with respect to those customers and yourself?

Mr. Kohn: If the Court please, I want to object to

490 that on the ground that it is vague and indefinite.

The Court: The objection is sustained.

By Mr. Clayton:

Q. I show you, Mr. Appelbaum, Defendant's Exhibit 73 for identification, being the copy of a letter dated November 11, 1952, and sent by Penguin Frozen Foods. I will ask you to look at that and state whether or not the original of that letter was sent to the addressee named therein.

A. Yes, I did.

Q. I show you Defendant's Exhibit 74 for identification, being the copy of a Western Union telegram dated February 4, 1953, sent to Penguin Frozen Foods by the plaintiff, and ask you whether or not you received the original of that telegram?

A. I did.

491 Mr. Clayton: At this time we will move that the Defendant's Exhibits 73 and 74 for identification be admitted into evidence, your Honor.

The Court: Any objection?

Mr. Kohn: I wish to object to 73 on the ground that the addressee—

The Court: Hand it up.

Mr. Kohn: —the addressee is an official of Nacional Financiera. This is not Saenz you have been talking about; this is Asunsolo? It is Pepe?

The Witness: Yes.

Mr. Kohn: I withdraw my objection. I thought the letter was addressed—is Asunsolo and Saenz the same? It is the same gentleman that has been mentioned earlier. I withdraw my objection. I thought it was the lawyer in the home office.

The Court: Hand it up and I will read it anyway. All right, 73. What was the other one?

Mr. Clayton: 74.

The Court: 73 and 74 are received in evidence, on behalf of the Defendant.

492 (Said documents so offered and received in evidence were marked DEFENDANT'S EXHIBITS NO. 73 and 74.)

The Court: Proceed.

Mr. Clayton: With the permission of the Court I would like to read the telegram.

The Court: You may read it.

Mr. Clayton: Exhibit 74, it reads:

"ReTel our machine as no news about the deveining machines which prevent us from starting operation. Signed

Refrigeradora del Noroeste, S. A."
Since February 4, 1953 Penguin Frozen Foods.
No further direct examination.
The Court: You may cross examine.
Mr. Kohn: If the Court please, I first now that they have completed the direct examination, want to make two motions to strike.
The Court: I will hear you at the end of the Defendant's case.
Mr. Kohn: Yes, sir.

Cross Examination by Mr. Kohn.

Q. Mr. Appelbaum, when you testified yesterday
493 you were asked the question as to the different businesses you were interested in, is that correct?
A. Yes, sir.
Q. You did not mention the firm known as Prons, Inc. Do you know that firm?
A. Yes.
Q. That is a corporation, is it not?
A. Yes, sir.
Q. What is the nature of its business?
A. They were breading shrimp.
Q. Where is it located?
A. Nogales, Arizona.
Q. Do you know who owns the stock of that corporation?
A. Mrs. Sabel. And there is another name I don't remember, and my son.
Q. And your son owns what percentage of the total outstanding stock?
A. 51 per cent, I think he owns and the rest of it—
Q. You haven't any interest in the stock of that corporation?
A. No, I have none.
Q. As collateral for a loan that might have been advanced?
A. Well, I have not.
494 Q. You have nothing to do with the management?
A. No.
Q. You do not direct its policies, to quote one of Mr. Clayton's remarks?
A. No.

Q. Isn't it true, Mr. Appelbaum, that you engaged in the farming business?

A. I have a farm.

Q. Martindale Farm?

A. That is right.

Q. You are in a partnership?

Mr. Clayton: I will object to that.

Mr. Kohn: You have asked him what his business was. I am trying to find out.

The Court: You may inquire into his additional business operations that he has.

By the Witness:

A. Yes, I have a farm.

By Mr. Kohn:

Q. You are a partner, isn't that right, engaged in the farming business?

A. Yes.

Q. You inadvertently neglected to say that?

A. I meant now.

495 Q. You were?

A. I say I had a farm.

Q. Oh, pardon me.

Mr. Appelbaum, you testified that you arrived in Mexico sometime in July, 1953, is that correct?

A. 1953, I believe it is.

Q. And you said you arrived in Mexico City about July 21, or July 22?

A. Probably the third week of July.

Q. That is right. Then he said that you went to Mazatlan, is that correct?

A. That is right.

Q. That is after July 21 or July 22, is that correct?

A. Well, it was somewhere in there. I can't remember.

Q. You said thereafter that Mr. Pinson handed you a letter in Mazatlan?

A. That is right.

Q. Dated July 17.

I hand you Plaintiff's Exhibit No. 6. Mr. Clayton asked you if that was handed you when you were in Mazatlan?

A. That is right.

Q. But you said it was after you were in Mexico City, is that right?

496 A. That is right.

Q. I hand you Plaintiff's Exhibit 20, which is dated July 22 and you admitted had been signed by you?

A. That is right.

Q. Now, in view of those two exhibits, do you want to change your testimony about the order in which you visited those respective cities?

A. About the dates, yes.

Q. In other words your story now is, after reading these exhibits—

A. The Mazatlan trip was after I was in Mexico City and the letter was after—the letter I wrote to them was after I came back from Mazatlan.

Q. How many times were you in Mexico City on that trip?

A. I was in Mexico City. Then I went to Mazatlan and I came back to Mexico City.

Q. So you are in Mexico City twice?

A. That is right.

Q. In other words, you now want to change your testimony to show that this July 17th letter was received before your July 22nd letter?

A. That is right.

Q. Was sent. I am just getting the date. In other words, you were in Mexico City twice?

497 A. That is right.

Q. Now, you say that some time in July, 1952, you had a conference in Mexico City with Sr. Pinson and Sr. Saenz, is that correct?

A. Yes, sir.

Q. In which this matter of breading was discussed?

A. Yes, sir.

Q. And I call your attention to a letter dated September 19, 1952. I hand you a letter dated September 12, 1952, marked for identification as Plaintiff's Exhibit 26, which appears to have your signature and is addressed to Sr. Pinson and ask you if you sent that letter?

A. I did.

498 Q. I now hand you another letter similarly addressed and signed by you, dated September 19, marked Plaintiff's Exhibit 27 for identification, and ask you if you sent that letter?

A. It is so close to 1952.

Q. Yes.

A. I did.

Mr. Kohn: I now offer these in evidence.

The Court: You have to wait until the plaintiff's case. This is now the defendant's case.

Mr. Kohn: I beg your pardon. I now show them to him.

The Court: They may be identified. Hold them for your case. Please go ahead with something else.

Mr. Kohn: I want to ask a question based on that.

The Court: All right.

By Mr. Kohn:

Q. Now, in the September 19, 1952 letter, Mr. Appelbaum, after referring to the inventory and sales, you concluded the letter, do you remember, as follows:

499 "Am anxiously awaiting your reaction to producing breaded shrimp down in Mexico. Why don't you answer me?"

The Court: What is the exhibit number?

Mr. Kohn: No. 27.

By Mr. Kohn:

Q. My question, Mr. Appelbaum, according to your testimony this morning, and repeated this afternoon to a certain extent, you indicated that you received the answer in Mexico. What were you waiting for a reply to as late as September?

A. I was waiting for him to produce shrimp.

Q. You said, "What is your reaction?" in this letter. The statement is, "Am anxiously awaiting your reaction."

A. What is the first part of it?

The Court: Read it, give it to him.

By Mr. Kohn:

Q. Here, I will give you the whole letter. The last sentence, last paragraph is the one I am calling your attention to.

The Witness: Shall I read this?

The Court: No, just answer the question.

By the Witness:

A. It refers to the paragraph before about the 12 500 inch cellophane that I told him would be shipped within two or three weeks and asked him what size shrimp he was going to pack in the 12 ounce packages and I was waiting for his reaction to find out whether that size was available or what size would be available.

By Mr. Kohn:

Q. Mr. Appelbaum, the last paragraph reads as follows:

"Am anxiously awaiting your reaction to producing breaded shrimp down in Mexico. Why don't you answer me?"

My question is, does that refer to the preceding paragraph and not to this alleged operation for breaded shrimp?

A. No. It refers to all the things that we had done up to that time for which we were waiting for an answer and we got no answer from them. As far as particular shipments that were sent down there, it looked to me like he was stalling or something was happening.

Q. Do you mean to tell the Court and jury that in that last paragraph that you were not referring to whether or not he was interested in going along with this proposal?

A. It had no—that proposal was settled.

Q. That is your answer?

A. That is right.

501 Q. All right, now, I will read you from a letter I just showed you dated September 12, 1952, identified as Plaintiff's Exhibit 26. After giving the report of the inventory and sales for the week you concluded the paragraph or letter with the following paragraph:

"No charge in the market."

I presume you meant no change. And then this pertinent part:

"Pepe—"

I assume that is Saenz, is it not? Which I presume is Saenz, is that correct? Pepe is the same as the gentleman you have been talking about?

A. I suppose so.

Mr. Kohn: The gentlemen you refer to.

(Reading.)

"—has a good idea about breaded shrimp that he is going to discuss with you. I think it would be a good deal for all of us. Give it some serious thought and any information that I can give to you, do not hesitate to ask."

What did you mean by that paragraph?

A. Probably had a good—

Q. Do you want to look at the letter?

502 A. I can tell you what I think it means.

Q. I do not want what you think. It is clear English.

A. I don't remember what this refers to.

Q. Let me ask you this question:

If, as you say, in July, 1952, even before this, according to the early testimony, this matter had been fully discussed and had been agreed upon, what was the occasion for your arriving at this late date and now mind you, this is September, 1952, and stating to this gentleman that we called Mr. Saenz, "has a good idea about breaded shrimp which he is going to discuss with you." Think it would be a good deal for all of us. Give it some serious thought and any information I could get for you, do not hesitate to ask."

A. Do you want me to answer what I think it was?

Mr. Kohn: Read the question, Mr. Reporter, please?

(The last question read as recorded above.)

By the Witness:

A. There were ideas springing up right along over the years we did business on everything. If there was any good ideas about ways of doing things, we were always open to them and this is probably another idea. I don't remember.

503 By Mr. Kohn:

Q. You don't recall what the idea was?

A. I don't remember what the idea was.

Q. Mr. Appelbaum, do you recall the conference in Chicago in September with Mr. Fraustro and others in which there was a discussion of the possibility of your acting as a sub-broker?

A. Yes, sir.

Q. Did Mr. Fraustro offer you a sub-brokerage that would last over a number of years rather than one that would only last for one more year?

A. I don't recall.

Q. You don't recall that?

A. No.

Q. Do you recall whether or not in the last conference, that is the last day of conference in Chicago, you mentioned any figure that you would be willing to take in liquidation of your alleged contract?

A. May I go back and answer that question?

Q. You mean something you forgot to tell me?

A. No, on this one before this. I do recall something now.

Q. You do recall something?
A. Yes.

Q. Yes. I am sure the jury and the Court would
504 like to know.

A. The question of the term of the contract came up on this sub-brokerage. And Jack Willis said he would guarantee no specific time.

Q. I asked you if Mr. Fraustro made you an offer. That was the question. I included him as well.

A. Fraustro told me he was not authorized to make me an offer.

Q. I understand that but was any consideration given to a tentative offer along those lines?

A. He couldn't specify any.

Q. Did he discuss a tentative offer?

A. That part I do not recall.

Q. Will you answer my other question?

A. Will you repeat it?

Q. Did you in the course of the last day or on the day on which there were two conferences, you recall, one in the morning and one in the afternoon, at which Mr. Collenburg, Mr. Willis and Mr. Fraustro and yourself were present and part of the time Mr. Clinton was present, do you remember, there were two conferences. In the course of those conferences did you at any time make an offer of a definite sum that you would expect in liquidation of your alleged contract with Reno?

505 A. I don't recall that.

Q. Do you remember a deposition?

A. I might have made that.

Q. Do you remember giving a deposition in March?

A. Yes.

Q. And I asked you the following question. This is a written deposition given in our office in May of 1954. Do you recall that incident?

A. Yes, sir.

Q. I asked you the following—

Mr. Kohn: I will withdraw that question.

By Mr. Kohn:

Q. Mr. Appelbaum, would you explain to us in connection with this alleged breading contract exactly what the part of Reno was to be?

A. Reno was—we were to procure the shrimp. They were to shell them, devein them, bread them, pack them in

boxes and freeze them. Pack them in master containers, and ship them in cars to Penguin Frozen Foods.

Q. They were to furnish the shrimp?

A. They were to buy the shrimp.

Q. In the off season?

A. Not only in the off season, they were to buy the shrimp—they said they could buy them in the off
506 season but if they could they were going to buy shrimp, the size of shrimp that were preferable for breading; that they could—that would be more advantageous to bread than to ship up during the season and used to put up in the off season when their plants were not too busy.

Q. I understood, Mr. Appelbaum, in your previous testimony that you indicated it was to be in the off season?

A. Including the off season. It was to keep their plant to capacity when they did not have enough on the other to pack and freeze.

Q. What is meant by the off season?

A. Off season, the off season on shrimp is from about July, about the 1st of June when they stop getting shrimp in until about the 15th of October.

Q. In other words during the season when there are very few shrimp available?

A. No. They could get shrimp in those seasons. They could put shrimp away for that purpose. There is always shrimp coming in and he said on the inland waters there they could get plenty of those sizes. He would have no trouble getting them.

Q. From other areas of Mexico?

A. I don't know. That was his problem.

507 Q. He said—

A. He assured us he would get them.

Q. You mentioned a Mexican corporation with a long name Exportadores, et cetera. What was the part of that corporation?

A. Through that Company, when he bought shrimp they were going to give him the money for the shrimp through that Company so that—

Q. Who is "they"?

A. That Company. That Company was to furnish some money to Reno if they bought the shrimp.

Q. What was your part in the picture?

A. My part in the picture was to sell the shrimp in the

United States and furnish them with labels, with our brand of labels which we had printed up for that purpose, and distribute the shrimp, and let them draw on letters of credit for us, this Company draw on letters of credit for us as they shipped the shrimp.

Q. Going back to regular shrimp, not breaded shrimp, you referred to the fact that you had commitments?

A. Yes, sir.

Q. So that, were those commitments with customers in Chicago area?

A. No.

508 Q. Mr. Appelbaum, you heard Mr. Olson testify that he examined the books of your Company?

A. Yes, sir.

Q. And he stated that when after correcting a mathematical error of $1.00 with the amount that should be credited—that is $1,000.00—the amount that should be credited for the Plaintiff was $198,839.00.

Do you remember that?

A. I remember hearing it, yes.

Q. Is that figure correct?

A. I don't know.

Q. I want to call your attention to the deposition that you gave last May, 1954 and ask you if I did not ask the following questions:

Mr. Clayton: What page?

Mr. Kohn: Well, I may have to ask a few preliminary questions. Looking at page 25 and also on page 48 and 49, right here.

By Mr. Kohn:

Q. Mr. Appelbaum, page 48 I think it is set out a little simpler.

Can you give us at this time the net figures that is due Reno on account of shipments of cars 31, 38, and you answered:

509 "There is nothing due Reno."

You meant what we should have credited to their account on this basis.

I said, "Yes".

And you said, you answered, "The figure would show it."

Then I asked you, "Will you say what it is?"

And you said, "$198,838.09."

Is that a correct answer?

Mr. Clayton: I will object to that, your Honor.

The Court: I can't hear you.

Mr. Clayton: I will object to that because the figure which he referred to as having been given by Mr. Olson, was a figure which Mr. Olson said was due Reno. The figure he is now reading from the deposition is a figure, not what this witness says was due Reno but a credit that should be set out on that basis.

Mr. Kohn: That was my question.

The Court: Overruled.

Mr. Kohn: I asked about the credit, I didn't ask about—

The Court: I have overruled his objection.

510 Are you talking me out of the ruling?

Mr. Kohn: No, sir.

The Court: Go ahead with the witness.

Mr. Kohn: I just want to straighten out something.

The Court: You take care of your side of the table and let Clayton handle his. He may answer.

Mr. Kohn: Would you read the question to the witness, Mr. Reporter?

The Court: You better restate your question.

By Mr. Kohn:

Q. Mr. Appelbaum, you have heard me read these questions and answers from the deposition, have you not?

A. Yes, sir, I have.

Q. Is the $198,000 and some odd, $198,838.09 figure as to the amount of credit, correct?

A. I don't remember unless I refer to the statements. I can't recall at this time. I believe at that time I had to refer to the statements, too.

Q. Well, I had read you the questions and the answers. There is nothing to indicate that you referred to any statement?

511 Is that a correct figure of the amount of credit that the Plaintiff is entitled to?

A. I don't remember at this time unless I refer to the statements.

Q. We have a statement here. I give you Plaintiff's Exhibits 18 and 19 to refresh your recollection.

The Court: While you are reading that we will take the afternoon recess.

(A recess taken.)

512 The Court: You may proceed.

By Mr. Kohn:

Q. Mr. Appelbaum, I hand you Plaintiff's Exhibit 21 which appears to be a letter sent by you on August 6, 1953, to the plaintiff.

I call your attention to page 3, to the paragraph headed: "Transit Insurance." It reads as follows—it is very short. (Reading.)

"Mr. Infante's calculations are correct on this item, and we are expecting a refund of approximately $1300 in the very near future."

And I ask you if you know what that refers to? Can you explain that item?

A. Where is it?

Q. I read it, at the very bottom of the page.

A. I don't recall, but if it is in here, it must be correct.

Q. Do you know what . means? Can you explain it?

A. I don't remember.

Q. I now hand you Plaintiff's Exhibit 28 for identification which appears to be a letter from you to the plaintiff dated—

Mr. Kohn: You have not seen this?

Mr. Sprecher: No.

513 By Mr. Kohn:

Q. (Continuing): —dated May 25, 1953, and ask you if that letter was sent by you on the date indicated?

A. It was.

Q. I call your attention to the third paragraph from the bottom which reads as follows: (Reading)

"As was explained to Mr. Infante, the $275.00 per month was an estimate of trucking insurance and we were in the process of having this additional premium adjusted. The insurance company finally agreed to this last week, and as soon as they perform an audit, an adjustment will be made to you accordingly."

Do you know what it refers to?

A. It refers to the truck insurance, but what happened to it, I don't remember.

Q. Is that the same as to what was referred to in the preceding letter: "Transit Insurance"?

A. Yes, I think so, yes.

Q. But you do not understand any more about it than has been indicated?

A. That is right.

Q. To go back to this matter of breading, the contract, can you tell us how many pounds a deveining machine of the type you sent to Mazatlan operates on in a period
514 of 24 hours?

Mr. Clayton: I object to that, your Honor. I don't see where that is material. The question is whether or not it was sent pursuant to the agreement.

The Court: Yes, but he testified as to a certain quantity he was going to ship in a year or over a year, and he testified he sent the one machine for this. I think it is material.

He may answer if it knows.

By Mr. Kohn:

Q. If you know?

A. I don't know.

The Court: Maybe the Jury are as ignorant as I and would like to know what a deveining machine is. I have not the slightest idea. I suppose it takes veins out of something.

Is that what it means? Is it anything like a Geiger counter?

Mr. Kohn: I think that is a very good suggestion. I would like to ask the witness to describe it.

The Court: Yes, if you would. I don't know
515 if the Jury is as ignorant as I, but I would like to know.

By the Witness:

A. The practice of deveining shrimp has always been by hand. Down there they devein shrimp by hand. Girls do it. They have invented a deveining machine that is in California that will take and feed the shrimp into the machine. It runs by electricity.

By Mr. Kohn:

Q. The Jury cannot hear you.

A. Previous to this time in Mexico, especially, they deveined by hand. The girls have a long knife with a long prong, and they push it along the shell, and they push it up, and it takes the shell off and the vein at the same time.

This machine was invented by somebody in California where they just drop this shrimp into the machine and it operates and splits them and takes the vein out of them. It will devein them as fast as you can feed the machine.

Mr. Pinson wanted this machine so he could compare whether the girls could do it faster than the machine, or whether the machine would operate faster than the girls.

516 The Court: We understand the use of the machine. Thank you.

Now, you can ask your question.

By Mr. Kohn:

Q. You used the figure of one million pounds of shrimp, did you not, in your previous testimony in connection with the breading contract?

A. Yes, sir.

Q. How long would it take a machine of the type that you have indicated to devein one million pounds of shrimp, if you know?

A. I have no idea.

Q. With further reference to this Mexican company, could you tell us who the stockholders were?

A. No, I can't.

Q. Do you know the company I mean?

A. Yes.

Q. Exportadores et cetera?

A. I know. Jack Kolb was one of the stockholders.

Q. Spell that.

A. K-o-l-b.

Q. Were you a stockholder?

A. Yes.

Q. Do you know how many shares of stock there were?

517 A. No, I don't.

Q. Were you a substantial stockholder?

A. Yes, sir. Fifty per cent, but they had it in Mexican. I didn't know.

Q. You don't remember the names of other stockholders?

A. I recall them in a minute. It just slipped my mind.

Q. Was there a name such as Steglitz?

A. Yes, Steglitz. I thought it was Kolb, but possibly Steglitz had the stock in his name.

Q. Anyone with a name similar to Saenz?

A. Yes.

Q. Is that the same Jose we have been talking about this morning?

A. That is right.

Q. Are there any other names that occur to you?

A. And Mr. Saldania.
Q. Who is Mr. Saldania?
A. Mr. Saldania is a lawyer in Mexico today.
Q. Was that company formed solely for this particular function?
A. Solely so that they could finance through Mexico the operation in Mexico.
Q. Is Mr. Saldania connected with Nacional Financiera?
518 A. I don't think so.
Q. Was he ever connected?
A. Yes.
Q. When did he first become connected?
A. The change of administration down—
Q. When the new president was elected?
A. That is right.
Q. Who was the owner of the shrimp that was to be acquired for breading; which company? Are you talking about now your own company and your own firm, the Mexican Company and Reno?
A. That is right.
Q. Who was the owner of the shrimp that was to be breaded?
A. The owner of the shrimp would be the Mexican company until they shipped it to us.
Q. Were they to purchase the shrimp?
A. No. Mr. Pinson was going to purchase the shrimp, and they were going to give him the money to buy them.
Q. For whom? For whom was Reno buying the shrimp?
A. They were buying it for us. Reno was shipping it to us.
Q. They were buying shrimp and selling it to the Mexican corporation?
519 A. They were selling it to Penguin.
Q. And the Mexican company you said was the owner. You meant that they financed it?
A. That is right.
Q. This Mexican company was the financing company?
A. That is correct.
Q. It was set up for this particular purpose and no other?
A. That is right.
Q. It was not in the position of selling shrimp and buying shrimp generally?
A. No.

Q. Who was going to buy and have the breading and all the other items you referred to?

A. We were going to pay for everything we purchased in the United States.

Q. You were buying that on your own behalf?

A. We were buying—we were billing it to them, and they would bill us for the completed price of the products packed and breaded and everything else.

Q. Who paid the bills for the breading?

A. We paid it in the United States.

Q. But you asked for reimbursement, is that right?

A. That is right.

520 Q. And you paid for the boxes?

A. That is right.

Q. You asked Reno to repay you?

A. That is right, but didn't ask to be paid until they packed and shipped them.

Q. The same thing related to all the items that you have referred to?

A. That is right.

Q. But all that you actually wanted Reno to do was to render the service of breading shrimp, is that it?

A. That is correct.

Q. You did not want them to buy the shrimp for you?

A. That was part of the service.

Q. You wanted them to render the service of buying, breading and forwarding the shrimp to you, is that it?

A. Not of buying the breading. We were buying the breading.

Q. Buying the shrimp?

A. And breading them and packing them and shipping them.

Q. And sending them to you?

A. That is correct.

Q. Reno has a freezing plant, has it not?

A. Yes, sir.

521 Q. Do you know if there are other freezing plants on the West Coast of Mexico?

Mr. Clayton: I object to that as immaterial.

The Court: The objection is sustained.

By Mr. Kohn:

Q. Mr. Appelbaum, you referred to commitments that you had made sometime in 1953 or 1954. Was it for the sale of shrimp to customers?

A. I made these commitments in 1952.
Q. Did you make any in 1953?
A. Well, they were the same commitments.
Q. No new commitments?
A. No, not that I can recall.
Q. You had no commitments for the 1953-1954 season?
A. Yes, we committed for the 1953-1954 season in 1952.
Q. Were these represented by contracts in writing?
A. No.
Q. Merely in the course of calling on the customer you said, "I will look out for you," or words to that effect?
A. Most of our business is done word to mouth. There is no reneging on contracts.
Mr. Kohn: There is no further cross.
The Court: Is there any redirect?
522 Mr. Clayton: Just one moment, your Honor.
Nothing further, your Honor.
Mr. Kohn: I have one question.
The Court: You may ask it.

By Mr. Kohn:

Q. What happened to this breading contract? Did you actually send any breaded shrimp to anyone?
A. We did not get any. All we got was some samples he sent us. He did not send any shrimp.
Q. There was actually no performance under the contract, is that correct?
Mr. Clayton: I object to that. It calls for a—
The Court: I sustain the objection. That calls for a conclusion.

By Mr. Kohn:

Q. There was no breading service performed by the—
A. Yes, there was.
Q. (Continuing.) —plaintiff?
A. There was service performed. They sent up samples.
Q. Beyond that, no shipments?
A. Just promises.
The Court: Any questions, Mr. Clayton?

523 *Redirect Examination by Mr. Clayton.*

Q. In respect to whether or not there was any breading of shrimp that Counsel just asked you about, approximately—were you ever told approximately how many boxes of breaded shrimp were prepared at the time that Ray Jensen went down to Mazatlan?

A. Yes, we received a letter telling us how much they had prepared.

Q. I show you, sir, Defendant's Exhibit 75 for identification. I ask you to look at this document, which is a letter on the stationery of Meletio Sea Food Company, addressed to Penguin Foods, dated February 17, 1953, and ask you whether or not you received that letter in connection with the breading of shrimp that was being done by the plant in Mexico?

A. I did.

Q. That was after Ray Jensen had been sent down?

A. Yes, sir.

The Court: Is there any recross?

Mr. Kohn: You are not offering that letter?

Mr. Clayton: I will. I did not want to ask him any further questions about it.

524 I move it be introduced in evidence.

The Court: Is there any objection?

Mr. Clayton: Is there any objection.

Mr. Kohn: To the letter? Yes. It is a letter of a third party.

The Court: You may step down.

(Witness excused.)

Mr. Kohn: It is from a third party.

The Court: Give it to the Marshal.

Mr. Kohn: I don't know it can in any way be binding upon this plaintiff and counter-defendant.

Mr. Clayton: This is offered, your Honor, for the reason that he just went into on cross-examination the question as to whether or not there were any breading of shrimp done by this company, and I think I would have a right to show that the company was actually breading shrimp.

Mr. Kohn: My objection is not to relevancy. It is—it is certainly pertinent to my questions, but this is from a third party to the defendant, if the Court please. It is hearsay. I can't cross-examine the writer of this letter.

The Court: For what it is worth, it may be received.

(Whereupon said document marked DEFEND-
525 ANT'S EXHIBIT NO. 75 for Identification was received into evidence.)

Mr. Clayton: May I be permitted to read it to the Jury, your Honor?

The Court: Yes, you may.

Mr. Clayton: This is a letter dated February 17, 1953, addressed to Penguin Foods, Incorporated, 120 South LaSalle Street, Chicago, Illinois. (Reading)

"Attention: Mr. Henry Applebaum:

Dear Henry:

"Just finished talked with Ray Jensen who is now hospitalized in Houston, Texas. Ray ran into the flu in Mexico and is laying over there for a couple of days.

"Ray reported to me that the first day in Mazatlan, they breaded 350 boxes. The second day they breaded over 900 boxes. However, Henry, you are probably aware that the Mexican operation is waiting for overwraps before continuing. Ray states that they did not even go through one barrel of Golden Dipt in these experimentations, but is fully satisfied that the Mexican operation is fully understood and the production line is well set and established.

In other words, he feels no need to return to Mexico,
526 in as much as they have got the line completely set up now.

"The writer is just taking the liberty of reporting the above information to you and some time next week at the Brokers' Convention, I will have Ray Jensen call you and give you the complete details. Best regards.

"Very truly yours,

"Meletio Sea Food Company,
Golden Dipt Division.
J. H. Meletio,
President."

The Court Call your next witness.

Mr. Kohn: If the Court please, I am not quite clear as to when I was to restate my motion to strike.

The Court: At the end of defendant's case.

Mr. Kohn: Thank you.

The Court: When I also will hear the matters set up in the pleadings on this item.

Mr. Clayton: At this time we move that Defendant's Exhibit 1 be admitted in evidence.

The Court: What is Defendant's Exhibit 1? Has it been identified?

Mr. Clayton: Yes, sir.

The Court: Is there any objection?

Mr. Kohn: Are you sure the last page was sent to
527 the plaintiff?

Mr. Sprecher: Yes. It was stapled together.

Mr. Kohn: There is no objection as far as relevancy.

The Court: It may be received.

(Whereupon said document marked DEFENDANT'S EXHIBIT 1 for identification was received into evidence.)

Mr Clayton: Now, we move that Defendant's Exhibits 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, and Exhibit 7, be admitted into evidence, your Honor.

The Court: Is there any objection?

Mr. Kohn: Yes, if the Court please—

The Court: Hand them up.

Mr. Kohn: This may take a little time.

The Court I am afraid I will have to spend it. Go ahead.

Mr. Kohn: If the Court please, these are documents that were in Mr. Willis' files, and they were turned over to the defendant for photostating, and through an oversight, which was both my fault as much as theirs, they failed to supply copies to me to examine. I have a general idea from a fleeting view and fast glance that they are documents—correct me if I am wrong—relating to the for-
528 mation and organization of Crest, is that right?

Mr. Sprecher: That is correct.

Mr. Kohn: My objections to them are first, by way of preface, I have no objection to the contract between Crest and E.A., but once that is admitted into evidence, and they are asking it be admitted in evidence, all preliminary negotiations and drafts were merged into that written contract.

I think it would only clutter up the record, and it is going to be a large record as it is, to admit all these preliminary items.

In addition, there are communications between Mr.

Willis' attorney and Mr. Willis and between attorneys for some of the other parties involved. I cannot exert the privilege on their behalf, so I am not arguing on that point, but those documents are of a preliminary nature; in view of the final execution of the contract, I do not see the pertinency of any of these documents.

I think it would only serve to confuse, and in view of the limited time I have to examine them, there may be some isolated paragraph completely irrelevant and that may be prejudicial.

The Court: Offhand I would be inclined to agree with you on the documents leading up to the execution of the contract. If the contract itself was received in evi-
529 dence it would speak for itself; as to what one asked for and the other one asked for and what the other gave in or the other gave in, of course, I don't think that is material, and they finally got to a contract.

I would think just this, Mr. Clayton, that you study these over the weekend, and I will hear you specifically on any of these preliminary documents that you feel are important, in view of the fact that I am going to admit the contract itself.

You can have a chance to look them over, also, Mr. Kohn, over the weekend. There are quite a number of them here.

I must mention that this Defendant's Exhibit 13, which is this table of that production which I required Mr. Willis to assemble and furnish us here, so that you can review that.

Mr. Kohn: I would like a copy of that.

The Court: You can review that over the weekend. Offhand I think we should have that in addition to that contract itself.

Mr. Kohn: It looks like a busy weekend.

The Court: It won't take long. I think those two things are about all in this batch that are material to this case, without unnecessarily cluttering up the record.
530 If you can find anything in the preliminary documents that you do except to, I will hear it Monday morning.

Mr. Kohn: We have no objection to the main contract that was actually signed being introduced.

The Court: All right. Remind me of that Monday morning first thing. I hope you will have forgotten it over the weekend.

Is there anything else?

Mr. Clayton: Will you please mark these documents Defendants Exhibits 76 on?

(Documents marked Defendant's Exhibits 76 through 84, inclusive.)

Mr. Clayton: We move that Defendant's Exhibit 76, being the deposition of Milo F. Hefferlin and was taken on March 1, 1955—

Mr. Kohn: I was there. I know it was taken.

The Court: Do we have the original on file?

Mr. Clayton: I understand—

Mr. Kohn: This looks like the original to me.

The Court: Milo who?

Mr. Clayton: Milo Hefferlin.

The Court: Apparently that was not filed in accordance with the rules.

Mr. Sprecher: By agreement it was not filed that
531 way, your Honor. There is a stipulation in the deposition that the sending of it to the Court under seal would not be required.

Mr. Kohn: I am not raising any technical points, but I do want to object seriously to cluttering up and expanding this already lengthy record. I want to object on the ground—

The Court: Who is Hefferlin?

Mr. Kohn: Milo Hefferlin is a gentleman with the Bank of America in San Francisco, and, of course, it is up to Mr. Clayton to show the relevance.

I will object after he has made his preliminary statement.

Mr. Clayton: I can say this, your Honor. The entire document we do not contend is relevant, but there are certain answers that were made to certain questions which would show the connection of the various parties as we contend exist.

The Court: See if you cannot work out a stipulation on those as to materiality.

Mr. Clayton: We can do that.

The Court: Can you agree to materiality on any part of this deposition?

Mr. Kohn: There might be in a small part, but it is only cumulative. It has been in the record in other
532 ways three or four times.

The Court: Over the weekend, if you can work

out a stipulation, all right; if not, I will rule on them Monday morning.

Mr. Clayton: Then we have the same with Defendant's Exhibit 77, which is a deposition of Oliver L. Martin taken the same day.

Mr. Kohn: The same situation.

The Court: If it is cumulative, there is no need of cluttering up the record.

Mr. Clayton: With respect to Defendant's Exhibits 78 to 84, inclusive, for identification, might I state, your Honor, that we do the same on them over the weekend?

The Court: Is that a deposition also?

Mr. Clayton: No, sir, these are various documents, letters, pertaining to communications with Nacional Financiera and persons involved.

The Court: I think so.

Mr. Kohn: Those are letters that were discovered at the Bank of America. They are authentic, but I object to them being introduced.

533 The Court: If there are one or two substantive sections that he wants from that can be stipulated to, do so. If not, prepare what you think should be admitted, and I will pass on it Monday morning, Mr. Clayton.

Mr. Clayton: Mr. Robert Appelbaum.

The Court: Very well, you may proceed.

ROBERT APPELBAUM, called as a witness on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Sprecher.

Q. Will you state your name, please?
A. Robert Appelbaum.
Q. Where do you reside, Mr. Appelbaum?
A. 849 Sheridan Road, Winnetka, Illinois.
Q. What is your business, Mr. Appelbaum?
A. I am a member of Penguin Frozen Foods.
Q. Where is your office?
A. 120 S. LaSalle Street, Chicago.
Q. Are you related to Mr. Henry Appelbaum, the Defendant in this case?
A. I am his son.

Q. How long have you been connected with Penguin Frozen Foods?

534 A. Since 1950.

Q. Is that about when it was organized?

A. It is when it became an active corporation.

Q. What position do you hold in that organization today?

A. I am a partner.

The Court: I don't hear you.

The Witness: I am a partner.

The Court: Thank you.

By Mr. Sprecher:

Q. What generally are your duties with Penguin Frozen Foods?

A. I handle all of the paper work pertaining to figures. I sell. Just a Jack of all trades, actually.

Q. Are you familiar with the books and records of that company?

A. Yes, sir. I supervise all that work, sir.

Q. Do you have any bookkeeper?

A. We have a secretary who does the bookkeeping entries; makes all the bookkeeping entries.

Q. You supervise the activities of that secretary?

A. Yes, sir.

Q. When did you first meet Mr. Pinson?

A. I think in 1950, sir.

Q. Were you familiar with the contract that has

535 been introduced as Plaintiff's Exhibit 1 in this case?

A. Yes, sir, I have read it.

Q. It is dated October 19, 1950?

A. Yes, sir, I have read it many times.

Q. Are you familiar with the extension agreement dated July 20, 1952, which was Plaintiff's Exhibit 3?

A. Yes, sir, I have read that many times.

Q. Are you also familiar with the telegram dated February 25, 1953, which purported to cancel that extension agreement?

A. Yes, sir.

Q. Calling your attention to that time what, if anything, happened as far as you know in relation to that situation of cancellation, to your personal knowledge, that is?

A. I don't understand.

Mr. Kohn: Will you repeat that?

Mr. Sprecher: All right.
The Court: You better reframe it.
Mr. Sprecher: Yes, sir.

By Mr. Sprecher:

Q. After February 25, 1953, what, if anything, occurred in relation to that situation that was outlined in that—

Do you want me to show you that exhibit?

Mr. Kohn: I object to that question that it is
536 general. I don't believe it is intelligible to the witness.

Mr. Sprecher: I will withdraw the question, and I will show him the exhibit.

By Mr. Sprecher:

Q. I will show you Plaintiff's Exhibit 4 and ask you to read it.

A. Western Union—

Q. Not aloud just to yourself. After that date, which is February 25, 1953, is that right—

A. Right, sir.

Q. (Continuing.) —did you go down to Mexico?

A. Yes, sir. My father sent me to Mexico in June of 1953.

Q. Whom did you see in Mexico?

A. The first person I saw was Mr. Alcalde.

Q. Do you know when that was in June of 1953?

A. No, sir, I couldn't pinpoint the date. It was probably around from the middle towards the end of the month.

Q. Where did you see Mr. Alcalde?

A. I saw Mr. Alcalde in his office in Mexico City. It is the office of Refrigeradora del Noroeste.

Q. Mexico City?

537 A. Right, sir.

Q. I think, in case the Jury does not know or does not recall, that you better tell us who Mr. Alcalde was at that time.

A. He was President of the Board of Directors of Reno.

Q. What, if anything, did you say to Mr. Alcalde and what did he say to you on that occasion?

A. Well, I asked Mr. Alcalde what all these letters and telegrams cancelling our contract meant and told him that we were quite concerned about them.

He said, "Well, you know in Mexico a contract doesn't mean anything."

I said, "You mean we can't do anything about this?"
He said, "No. I am afraid you will just have to go and see Mr. Fraustro and tell him your story."
Q. Was that the end of the conversation?
A. Yes, sir.
Q. Did you go to see Mr. Fraustro?
A. Yes, sir.
Q. When did that occur?
A. Oh, I saw Mr. Fraustro probably, the second day of my visit in Mexico City.
538 Q. Where did you see him?
A. At the Nacional Financiera office.
Q. At his office there?
A. Yes, sir.
Q. Just to refresh the jury's recollection, Mr. Fraustro is the man who testified here earlier in these proceedings?
A. Yes, sir.
Q. He is seated over there (indicating)?
A. Yes, sir.
Q. What was his position with Reno and with Nacional Financiera at that time that you saw him at that time?
A. At that time I believe he was the comptroller of the Nacional Financiera. He was a member of the Board of Directors of Reno and he was handling the affairs of Reno for Nacional Financiera.
Q. What, if anything, did he say to you and what did he say to you on that occasion?
A. Well, the primary thing that Mr. Fraustro told me was that the cancellation of the contract with us, all these wires cancelling it, was primarily to give the new members of the Nacional Financiera free hand in organizing their distribution of shrimp from Reno, and that actually we possibly did not have anything to worry about, be-
539 cause it was just the idea of giving them a free hand.
That is all I can remember about that meeting, yes, sir.
Q. Were there any other meetings with other officials after that in Mexico?
A. Yes, sir.
Q. Whom did you see after that in the same visit that we are speaking of?
A. It was that night.
Q. After your discussion with Mr. Fraustro?
A. Yes, sir.
Well, the next morning with instructions from my father

whom I telephoned the previous night, I went back to Mr. Fraustro and I told him what, I put our cards on the table as my father had directed me to.

In other words, I told him just what we thought that Mr. Pinson was trying to do as far as undermining our position, our concern with the Board of Directors of Reno.

I told him we had no faith in what Mr. Pinson told us anymore, and I offered to show at any time that the prices that we had been getting were better than those of similar distributors in the United States.

I remembered something about a previous conver-
540 sation.

Q. Well, if you do, all right. This is now the conversation you had with him the day before that you remember something about?

A. Yes, Mr. Alcalde in my first conversation on the first day I arrived in Mexico.

The Court: He may state it.

By the Witness:

A. (Continuing.) Mr. Alcalde had told me that Mr. Pinson had been undermining us to the board of directors and telling them the prices we were securing for shrimp were highly inadequate and lower than all the other distributors, primarily Marine Products and Wilbur Ellis Company in the United States.

By Mr. Sprecher:

Q. Getting back to the second Fraustro meeting, what else, if anything, occurred at that meeting?

A. Well, that is all I can remember, except at the same meeting maybe a few minutes before or a few minutes after—I mean it is all on the same morning—Mr. Pinson was at the same meeting. He was not there present all the time, when I so-called put my cards on the table to Mr. Fraustro, he was not there, but when he was in there I again offered to prove to Mr. Fraustro in front of Mr.

Pinson that we would prove by providing invoices
541 of our competitors that we had been securing ade-

quate, if not better than adequate prices for their shrimp, and doing a lot better job than what our competitors were doing for their—

Q. Did you see anyone else in Mexico on that trip after that meeting that you have just described?

A. I was at the home of Mr. Saenz, and I saw Mr. Saenz at his office after that meeting.

Q. Mr. Saenz at that time was a director of Reno?

A. I believe so.

Q. What, if anything, did he say to you and what did you say to him when you saw him?

A. He just told me that Mr. Pinson was undermining our position with the board of directors, and that we probably would not be able to do very much.

And then, by the way, I remember something else in Fraustro's office.

Q. All right.

A. I asked Mr. Fraustro, because we had heard a lot of talk about this new organization being formed, and I asked Mr. Fraustro, "What about that new organization?"

And he said, to his best opinion that organization had not progressed to the point where he thought it would be in operation for the 1953-1954 season, and that we probably did not have to worry about that.

542 Q. Is that all?

A. That is all.

Q. And then, did you see anyone else in Mexico on that occasion?

A. I went to Mazatlan.

Mr. Kohn: That is a little broad, counsel.

By Mr. Sprecher:

Q. You went to Mazatlan?

A. Yes, sir.

Q. Who did you see there?

A. I went to the Reno plant and I saw Mr. Pinson and Mr. Sergio Infante.

Q. Did you discuss your contract with Reno with Mr. Pinson on that occasion?

A. No, sir.

Q. After that meeting when was the next time you saw Mr. Fraustro and Mr. Pinson or either of them?

A. Why, I saw Mr. Fraustro when he came to Chicago.

Q. When was that?

A. I might have stopped off and seen him on my way back to Mexico City to Chicago.

Q. When did you see him in Chicago?

A. When he came up to my father's office towards the middle of September, 1953.

543 Q. I think Mr. Fraustro stated he had several meetings. He testified he had several meetings with your father and Mr. Willis and Mr. Pinson. I believe he said they began about September 18. Now, is that about your recollection?

A. Yes, sir. Mr. Pinson wasn't at any of those.

Q. Oh. Who was at the first meeting then and would it be on or about September 18?

A. I think September 18 is the date, sir.

By the Court:

Q. In Chicago?

A. Yes, sir. My father's office.

By Mr. Sprecher:

Q. Who was at the first meeting that you attended?

A. I was there, Mr. Fraustro and my father.

Q. The three of you?

A. Yes, sir.

Q. Did Mr. Fraustro have an interpreter there?

A. No, sir.

Q. What, if anything, was said by the persons at that meeting?

A. Mr. Fraustro asked my father if for $12,000.00 he would just forget the whole—that a contract ever existed and step out of the picture.

544 My father refused. My father asked Mr. Fraustro if he was an authorized representative of Reno and Mr. Fraustro, I don't remember his answer to that, but to a further question of my father's of whether Mr. Fraustro was authorized to endorse this contract or make any kind of a deal whatsoever, Mr. Fraustro said he was not.

Q. Was anything else said at that meeting?

A. My father insisted that he had a contract with Reno. Am I talking too loud?

The Court: No, indeed. It is refreshing to have you talking the way you are.

By Mr. Sprecher:

Q. Do you recall any further details of that meeting?

A. No, sir, I do not.

Q. When did you again meet with these gentlemen?

A. Well, we met the next day and I was in on the meeting.

Q. Do you recall for the jury what was said on that occasion?

A. Yes, sir. My father again insisted that he had a contract with Reno.

Mr. Fraustro asked my father if he would work as a sub-broker for Crest.

My father said he had a contract with Reno but
545 anything that they offered was equal to or better than what he had and would help Reno out, he would be more than happy to go along with.

And I believe I personally typed up a list of prerequisites or list of conditions under which we would go along with Crest, in any sort of an agreement.

Q. Anything else at that meeting?

A. Mr. Fraustro looked at the list. He said it looked interesting. He wasn't sure what could be done but he would call back Mexico and advise us.

That was all I can remember, sir.

Q. And when did you meet the next time?

A. Mr. Fraustro was our guest for either part or an entire week-end, at our home on our farm.

Q. When did you have the next business meeting?

A. I believe it was the following Monday, sir. It might have been Tuesday, but I believe it was Monday.

Q. Who was present at that time?

A. At that time there was Mr. Collenburg, Mr. Fraustro, Mr. Willis, my father, and myself, and Mr. Clinton arrived shortly thereafter. Then my father got a lawyer to take the counterpart of Mr. Collenburg.

Q. What if anything was said at that meeting?

A. Well, as I remember, the majority of the dis-
546 cussion was between Mr. Willis and my father concerning under what conditions Penguin would work as a sub-broker for Crest. There were various propositions offered one of which would give us the protection for our customers or fulfill our promises to our customers.

Mr. Kohn: If the Court please, I move to strike any statements of the witness characterizing the offers. I have no objection to his stating to what was actually said.

The Court: Sustained. The last two sentences of the answer may be stricken. Confine yourself to what was said and who said it.

By the Witness:

A. Yes, sir.

The Court: The jury will make their own interpretations. Do not make yours.

The Witness: Yes, sir.

By Mr. Kohn:

Q. What else was said at that meeting?

A. Well, my father said—that he refused these various offers because he said they would not give him adequate protection or fulfill his promises to his customers.

And he also said that the various propositions were nowhere equal to the existing contract that we in-
547 sisted upon that we had.

Before the meeting broke up, I don't know who offered it but it was either Mr. Collenburg, Mr. Fraustro or Mr. Willis, but one of the three offered us $25,000.00 to wash us out, for us to forget everything concerning the contract and my father refused.

Q. Anything else?

A. Not at that meeting, sir, that I can recall.

Q. Was there another meeting after that one?

A. There was about a three minute meeting that same afternoon when the same three gentlemen came into our office.

They asked my father would he accept $25,000.00 and a sub-brokerage working under Crest, 2½ per cent or would he accept $40,000.00 and forget everything else in complete washout of our demands, to which my father said he refused.

Q. That was the end of the meeting?

A. Before Mr. Collenburg left, I came before the three gentlemen left, I do remember Mr. Collenburg saying, "I suppose we will have to—that means we will have to go through with the contract."

And my father said, "That is fine with me."

Q. Anything else?

548 A. That is all that I can remember, sir.

Q. Mr. Collenburg testified about a telephone conversation that took place, I think he testified on October 14, 1953.

Were you a party to that telephone conversation?

A. I was a party to a telephone conversation between—I was on an extension, on a telephone conversation between my father and Mr Collenburg about that time, I think, I even spoke a few words to Mr. Collenburg.

Q. Did he know that you were on the extension? Did Mr. Collenburg know that?

A. Well, I spoke to him.

Q. All right, what was said on that telephone conversation by each party?

A. Mr. Collenburg asked my father if he had sent the money that Reno demanded to them.

And my father said, "No, that no money was due."

Mr. Collenburg said that didn't he realize it was his obligation to send them the money?

My father said that he would send anything they wanted if they—inasfar as money was concerned, if Mr. Collenburg would guarantee the contract with Reno—our contract with Reno.

Mr. Collenburg said he couldn't do that.

549 My father said, "Will the Nacional Financiera do that, guarantee our contract?"

Mr. Collenburg said he didn't know. He would communicate with them.

It was at that time, I believe, that I interrupted and said that—well, what I actually said, "We can't trust Reno anymore, we will trust Financiera."

And then my father said, "Even a performance bond will suffice."

Then, Mr. Collenburg said he would communicate our words to them—I don't remember whether he said Nacional Financiera or to Reno.

Q. Is that the end of that conversation?

A. As far as I remember it, sir.

Q. Mr. Appelbaum, I would like to show you Defendant's Exhibit No. 72, which consists of interrogatories and answers thereto and ask you whether you have seen that document before?

A. Yes, I have.

Q. Are you familiar with the figures which are appended to it by way of exhibits showing the production by the Reno plant during the '53-'54 season?

A. Yes, sir. I have looked over before and this, I believe, is the same document I have seen.

550 Mr. Sprecher: Will you identify these exhibits and mark them as Defendant's Exhibits 85 and 86?

(Said documents were marked as requested.)

By Mr. Sprecher:

Q. I now show you, Mr. Appelbaum, Defendant's Exhibits for identification Nos. 85 and 86, and ask you whether after examining the figures there shown in Defendant's Exhibit 72, whether you then translated those figures into market prices to determine the resale price of the shrimp that are listed in Exhibit 72?

A. Yes, sir, an estimated market price.

Q. Will you explain very briefly what you did, how you reached your conclusion of the market prices?

A. I took the United States Fish and Wild Life Reports put out by the United States Fish and Wild Life Department, The San Pedro California branch. I took that branch because it was closest to the one where Marine Products and Wilbur Ellis Company and Crest Company operate. It is very close to San Diego.

Q. Did you consider those most comparable prices?

A. Yes, sir. Actually different branches of the Fish and Wild Life Service put out different reports for different areas of the country, but I chose those because
551 of geographical appropriateness.

Q. Are these retail or wholesale prices?

A. Those are prices charged to distributors. I mean they are not actually wholesale or retail prices. They are prices charged by people with Crest Importing Company and Marine Products.

Q. And like Penguin Frozen Foods of the season of 1952-'53?

A. Right, sir.

Q. Would you proceed, sir?

A. Yes.

Q. What did you do then?

A. I took—may I add one thing to those documents?

Q. Surely.

A. Those, to my knowledge, prices are put out by this branch of the government once a week. They publish it daily, but the prices are quoted only once a week unless there is a radical change.

Mr. Kohn: If the Court please, I ask that the witness be directed only to answer the questions that are put to him. He several times volunteered information. I do not want to delay the proceedings.

The Court: Proceed and answer the question.

552 By Mr. Sprecher:

Q. Will you go ahead with the computation?

A. I took the figures, the prices as published in these documents and I spread them on a sheet of paper for the classification of shrimp. In other words, shrimp come under various sizes; and I took the prices as shown, the highest price as shown on those reports and spread it ac-

cording to the date, the publication and the size of the shrimp in question.

Mr. Kohn: If the Court please, I have refrained from objecting to this line of testimony. I am considerably up in the air as to what the purpose of this testimony is. As I understand it he has taken some reports given by the Plaintiff showing what shrimp would produce. We do not see the relevance of all this evidence about prices. I don't know whether it is wholesale, retail, to jobbers,—

The Court: You will have an opportunity to cross examine, but I think your point is well taken. What is that you seek to bring out by this testimony?

Mr. Sprecher: We have asked the Plaintiff Reno to
553 furnish us with the market prices in the interrogatories. That was not given and we are now taking a quantity of shrimp that was produced by Reno in the 1953-'54 season, reducing it to the market price to find out at what price, if the current price were obtained that quantity of shrimp would have been sold during the '53-'54 season, your Honor.

The Court: So we are now getting the details of it?

Mr. Sprecher: Yes.

The Court: Do it with as few questions as possible.

Mr. Kohn: If the Court please, I want to move to strike all the testimony that has been adduced along that line for the reason we are now dealing with a case which the parties involved are a Chicago distributor and he is now giving us the prices at a different area. I don't think it is comparable, it would seem to me.

Mr. Sprecher: I can ask the question about that.

By Mr. Sprecher:

Q. Mr. Appelbaum—

554 The Court: Put the question and I will rule on your objection.

By Mr. Sprecher:

Q. In what way do the prices in San Diego relate to those in Chicago for shrimp at any time for any particular—

Mr. Kohn: If the Court please, I want to object to that question. The witness has not been qualified as an expert, as far as I can tell from the questions that have been propounded. He is relying on figures furnished by some other agency, an agency that—there has been no back-

ground of what that agency is or are we to assume what the Wild Life organization is?

The Court: Is the Bureau of Fish and Wild Life, do they present a report on market prices in Chicago on fish?

Mr. Sprecher: Does it?

The Court: I am asking you, counsel?

Mr. Sprecher: I don't know, your Honor. I am asking Mr. Appelbaum.

The Court: I think you better prepare a little further. We are getting towards the evening adjournment here anyway. I think you better prepare a little further
555 foundation. I would take judicial notice of the official publication of the Bureau of Fish and Wild Life Conservation Department. I believe it is the Interior now, isn't it?

Mr. Sprecher: That is right.

The Court: If you will produce such a report, and it is unnecessary for him to rattle off and if it is a matter of computation from such a report you can prepare a small summary computation.

Mr. Sprecher: All right.

The Court: I do want testimony as to whether or not, or produce the official gazette which will answer for me whether or not similar prices are given by the same Bureau or the same Department of the government for the Chicago market or area, which is the area in which we are concerned and why you feel that the San Diego prices are material.

Now, do I make myself clear?

Mr. Sprecher: Yes, sir.

The Court: Have that by Monday morning and I think you could save an awful lot of time if you prepare it
556 yourself from official documents, and show me where you got it from.

Mr. Sprecher: All right.

The Court: All right. With that in mind and I have given each of you and Mr. Clayton considerable homework over the week-end.

Mr. Clayton: Yes, sir.

The Court: I think I better let you go. We will recess now until Monday morning at 10:00 o'clock.

(Whereupon at 4:30 o'clock p. m. an adjournment was taken until Monday, June 13, 1955, at 10:00 o'clock a. m.)

557 Before Judge Campbell, and a jury, Monday, June 13, 1955, at 10:00 o'clock.

Court convened pursuant to adjournment.

Present:

Mr. Louis A. Kohn, Mr. Patrick O'Brien, appeared on behalf of plaintiff;

Mr. Robert A. Sprecher, and Mr. Joseph Clayton, appeared on behalf of defendant.

558 The Clerk: No. 53 C 2482, Refrigeradora Del Noroeste, S. A., *vs.* Henry Appelbaum, on trial.

The Court: Have you gone over the matters I told you about?

Mr. Kohn: You asked us to hand you instructions.

The Court: Yes.

Mr. Kohn: I served a copy on the defendant.

The Court: Yes. Give it to the Clerk. The originals will be filed.

You have yours?

Mr. Sprecher: My copies are about ready. They are almost through.

The Court: When they come give them to the Clerk. File the originals. There is no question about how you requested me to instruct.

Pursuant to the Rules of Civil Procedure you will be informed prior to your argument to the jury my proposed charge. You will have opportunity to object to the charge out of the hearing of the jury after it is given and before the jury retires, all in compliance with the Rules of Civil Procedure.

Mr. Kohn: I would like to suggest, under the new Rules of this Court, yours will be lettered and by number.

The Court: If you number them I can use them just the same.

How about the things you were going to do over the
559 week end?

Mr. Sprecher: There are a number of things that I think we have taken care of, most of them.

The Court: Have you made some progress?

Mr. Sprecher: I am not stipulating.

The Court: Mr. Sprecher, come over here.

Mr. Kohn: Mr. Sprecher came over to the office this morning.

The Court: What is the first?

Mr. Sprecher: The first, your Honor, I discussed with Mr. Kohn a few of the exhibits which I think were inadvertently left off. I would like to just indicate that for the record. On page 435 it was received into evidence Exhibits 46 through 50 and I think Exhibit 45 should also have been received in evidence. That was what we had agreed to.

The Court: Does the record show that it was not received?

Mr. Sprecher: No.

The Court: Wait until the jury comes in. You have to offer that in the presence of the jury.

Mr. Kohn: His point is it was a typographical error.

The Court: Oh, very well. Let the record be corrected and to show that Exhibit 45 in behalf of the defendant has been received in evidence.

Mr. Sprecher: Also on pages 479 and 480, the same thing happened, Exhibits 52 through 57 were admitted. It should have been 52 through 71.

The Court: Very well. Let the record be corrected accordingly to show that Defendant's Exhibits 52 through 71 were received on behalf of the defendant.

Mr. Sprecher: On page 507 the last answer on that page should be "No," instead of "Yes."

The Court: Very well. Let the record be corrected accordingly.

Mr. Kohn: If they are going to make corrections on all the record, I have a number too. I do not want to take the time of the Court. For example, in the opening statement, I used the phrase as "hardly controversial," and it came out "highly controversial."

The Court: The jury will not be reading your opening statements and I am sure by now they have forgotten it anyway.

Mr. Kohn: That is right. Maybe it is just as well.

The Court: Yes. At that time it was important. Now, what are the exhibits?

Mr. Sprecher: There are exhibits that are related to the deposition taken at the Bank of America.

The Court: Yes, how about those?

Mr. Sprecher: There are two of the depositions. I

have taken from those, where one paragraph from one of them I think is admissible.

561 The Court: From one of the depositions or from one of the exhibits?

Mr. Sprecher: One of the depositions.

The Court: Whose deposition is being taken?

Mr. Sprecher: It was the deposition of Oliver L. Morton.

The Court: Who is he?

Mr. Sprecher: He was an officer of the Bank of America in San Francisco.

The Court: Oh, yes.

Mr. Sprecher: And the other one was Milo Heffernan.

The Court: Were they taken for evidentiary purposes?

Mr. Sprecher: They were.

The Court: You want one paragraph of it and you want the whole deposition read?

Mr. Kohn: I do not want any, not a single paragraph.

The Court: That is nice. Hand it up so I know what you are talking about.

Mr. Sprecher: All right.

The Court: Which one is it?

Mr. Sprecher: This is Morton—the paragraph that I referred to is on page 7, line 29.

The Court: Page 7?

Mr. Sprecher: Yes.

The Court: What is everything that goes ahead of this?

Mr. Sprecher: Perhaps, your Honor, I should give you this other one also.

562 It is what occurred at a meeting at the Bank of America in August, 1953, at which Mr. Pinson appeared and Mr. Wilson, Mr. Coppel, and some of the others who were mentioned, about setting up credits for Crest Importing Company.

I think there are about 50 documentary exhibits which were introduced in that deposition. I picked out 8 of them that I would like to offer.

The Court: To offer into evidence?

And your objection?

Mr. Kohn: I object on the ground that these depositions in total should not be admitted for the reason that they are not material to the issues on the case.

Furthermore, they are merely cumulative of evidence that has already gone in the record; that it is admitted that there is a corporation by the name of Crest Importing

Company; that it had a contract with E. A.; that there was a long range plan for the distribution of shrimp; that was being financed through the Bank of America.

I cannot see for the life of me how if adds anything. It merely clutters up the record.

I wish to object to the admissibility in total of these depositions.

The Court: You mentioned you are offering only one paragraph?

563 Is that line 29? Is that your stipulation?

Mr. Sprecher: That is right, your Honor.

The Court: Mr. Clinton at that point states: (Reading.) "Can we stipulate that in the control document files of the Bank of America for Nacional Financiera, it is indicated that the borrower is Nacional Financiera and that there is contained in the folder the by-laws of Crest Importing Company, Inc., and this document which I will have introduced?"

"Mr. Kohn: Whatever is in the files, I will stipulate for what it is worth."

Now, do you want that stipulation read to the jury?

Mr. Kohn: Read the next two sentences.

The Court: Well, are these the documents you have here now?

Mr. Sprecher: Yes, I have the documents here.

The Court: (Reading.)

"Mr. Clinton: These entire files then contain the by-laws of Crest Importing Company.

"Mr. Kohn: I don't see why we should clutter up the records."

Mr. Sprecher: Your Honor, I am not introducing the by-laws.

The Court: You don't want the by-laws. Now, what documents pursuant to this stipulation do your want 564 in? Is that what we are at now?

Mr. Sprecher: No, just that stipulation. The importance of it, your Honor, is the fact that Nacional Financiera in August of 1953 was guaranteeing the Willis account.

The Court: You don't want to re-stipulate to the same thing here now?

Mr. Kohn: No, because that was what the top of the folder says. To get the right story you have to leave the complete files. I think it is very misleading just to read an isolated portion of it.

The Court: Whatever is in the file you said you would stipulate to for what it was worth.

Mr. Kohn: There is more to the file than just the folder. That is just the folder.

The Court: Well, you were asked to stipulate at that time that the control document files of the Bank of America, that in those files it is indicated that the borrower is Nacional Financiera and that it is contained in the folder, in the by-laws of the Crest Importing Company. I don't see how it damages you in any way.

Mr. Kohn: I think it is inaccurate, somewhat.

The Court: It is what?

Mr. Kohn: I think it is somewhat inaccurate. It does not tell the whole story.

The Court: Where is the folder? Is it here?

Mr. Sprecher: I just took out the 8 exhibits I mentioned.

565 The Court: Now then, you want these 8 exhibits received in evidence?

Mr. Sprecher: Yes, your Honor.

Mr. Kohn: I make the same objections.

The Court: Can you tell me briefly what they are, or shall I read all of them?

Mr. Sprecher: Yes, I can tell you, your Honor.

Exhibit 78 is a letter to Nacional Financiera from the Bank of America dated August 7, 1953, setting up this conference that was to take place. I don't have a copy.

Mr. Kohn: Here is our copy.

Mr. Sprecher: (Continuing.) Showing that the credits were established in the name of Nacional Financiera to finance Crest.

The Court: What is your objection to that going in?

Mr. Kohn: Our objection is that this set-up between Crest and E. A., and the part that Nacional Financiera has in it has been more or less admitted.

I would say it has been admitted. Now, he brings in here a whole volume of documents that are merely cumulative and have nothing to do with the material issue in this case. There is no question about this project in the way it is to be financed.

The Court: Apparently that is all he wants. If he
566 makes the stipulation the same as the one contained in this deposition, counsel, do you still want all of these documents in?

Mr. Sprecher: Yes, your Honor, I think we should have them.

The Court: Aren't they cumulative?

Mr. Sprecher: They may be—

The Court: What ultimate fact do you intend to prove by these documents other than the fact that Crest was financed either with the credit of or the funds of Nacional Financiera?

Mr. Sprecher: It is that, the additional fact that we have the issue here as to what the situation was when Reno attempted to reinstate the contract. I think we are entitled to show everything that took place at that time—the thoroughness with which this organization had been set up, and the fact that it has been established to take the place of the functi[illegible] which we had under our contract with Reno.

Mr. Kohn: If the Court please, counsel overlooks—

The Court: I think that has been admitted from the stand, hasn't it?

Mr. Sprecher: Well, it may be, your Honor, but I think it is not cumulative in the sense that this whole atmosphere in which we were asked to reinstate the contract is pertinent material here.

567 Mr. Kohn: If the Court please, there is one objection which I probably should have mentioned first, and that is this: You will recall that E. A., was made up of a number of Companies.

568 That, out of the total production of the West Coast group that was represented in this E. A. set-up, that the plaintiff only represented fifteen to twenty per cent.

Now, regardless of what plaintiff did with its contract with the defendant, these other companies and E. A. were starting a long range operation. Now, they did not have to wait for the plaintiff, so they naturally would go ahead and pursue their own plans for the future.

To inject all this at this time as to what occurred at that time, I think would be highly prejudicial to the plaintiff, in addition to the other reasons.

The Court: Make a brief statement of what is in the rest of these. You told me about 78. What is in 79?

Mr. Sprecher: Yes. In 79 it shows, your Honor, that Nacional Financiera planned to organize this American corporation, and that Reno was part of that corporation, that group, and also shows that Nacional Financiera controlled Refrigeradora Del Noroeste and is coming to the—

Mr. Kohn: That is certainly in the record already.

The Court: Well, let him finish.

Mr. Sprecher: Exhibit 80 shows the meeting, and Mr. Fraustro and Mr. Pinson, two officers, directors of Reno were attending that meeting in August of 1953 for the purpose of financing credit through Nacional Financiera.

Exhibit 81, we are withdrawing, your Honor.

569 Exhibit 82 is a letter to Mr. Fraustro who is an officer and director of Reno from the Bank of America showing the details of the line of credit which had been established after the meeting which was referred to in the former correspondence.

83 sets forth the Crest financing in more detail. It is a letter dated September 18, 1953, and goes into some detail as to how Crest was to be financed, and it again shows Nacional Financiera as guaranteeing the credit.

Exhibit 84 is an earlier document. It is a letter from Nacional Financiera to the Bank of America guaranteeing the Reno credit at the time of the Appelbaum credit. We think that is material for another reason. It has been mentioned to this point. That is, Nacional Financiera even guaranteed the Appelbaum contract during the existence from time to time. This is an example of that.

The Court: Is there anything further on these exhibits?

Mr. Kohn: I will restate the same objections previously urged to all but Defendant's Exhibit 84, which is a little different situation. I am looking at that.

I have no objection to 84.

The Court: You are withdrawing No. 81?

Mr. Sprecher: 81, yes, your Honor.

570 The Court: Very well.

Mr. Kohn: I have no objection to 84.

Mr. Sprecher: I would like to state the portion of 76 which we would like to introduce. I told you 77—just that one paragraph.

The Court: Yes, what do you want from 76? Who is Hefferlin?

Mr. Sprecher: Hefferlin is also an officer of the Bank of America in San Francisco.

Page 1, just to identify him, and then page 4, line 7, to page 8, line 15, which describes a meeting, and from page 10—

The Court: Wait a minute. Wait a minute. I cannot read that fast.

Page 4, line what?

Mr. Sprecher: Line 7, to page 8.

The Court: What is the substance of it?

571 Mr. Sprecher: It describes this meeting in August, 1953, at the Bank of America to finance Crest.

The Court: Is there any objection to that?

Mr. Kohn: Yes, the same objections that have been previously urged.

I would like to point out that they had here on the stand as an adverse witness, Mr. Willis, who was a party to that.

The Court: And who admitted attending the same.

Mr. Kohn: And admitted the conversation, but they did not see fit to ask him about that in detail or hardly at all.

The Court: Is there anything further on this exhibit?

Mr. Sprecher: Page 10, line 29.

The Court: That is covering another conference?

Mr. Sprecher: That is right. Then to page 12, line 7.

The Court: Is there anything else?

Mr. Sprecher: That is all, your Honor. And then those exhibits.

The Court: Well, I think this last, this number 76 is definitely cumulative and is just cluttering the record. I think there are certain inferences you might be able to argue to the jury from these documentary exhibits and from the stipulation made in the deposition of Mr. Morton.

572 Accordingly, Plaintiff's objections to the Defendant reading the portion indicated in Plaintiff's Exhibit 76, of the deposition of Hefferlin, I sustain and those will not be read.

The Plaintiff's objections to reading the stipulation starting at line 29, page 7, and the deposition of Morton are overruled, and the Defendant may read that.

The Plaintiff's objections to Exhibits 78, 79, 80, 82, and 83 are overruled, and those exhibits will be received in evidence. There is no objection to Exhibit 84, and that will be received in evidence. These, of course, must be offered while the jury is in the box, however; but, I have indicated my ruling for the record and it is unnecessary for you to object to them again.

Mr. Sprecher: There was another thing, your Honor, that you asked us to do, and that was to get the Willis' Exhibits ready.

The Court: Yes.

Mr. Sprecher: Mr. Kohn wants to—well, I have not been able to give him copies, which I will do right now. They have just been photostated.

The Court: These are the documents he produced pursuant to my subpoena duces tecum?

Mr. Sprecher: Yes, that is right, your Honor.

573 The Court: Why don't you give him his copies now, and confer over the noon hour and then if you need me you can come back at 2 o'clock.

Mr. Kohn: That is the way.

The Court: Yes.

Arrange the tables now, and then bring in the jury, please.

(Whereupon the following proceedings were had in the presence and hearing of the jury:)

The Court: Good morning, ladies and gentlemen. The witness will resume the stand.

ROBERT APPELBAUM, called as a witness on behalf of the Defendant, having been previously duly sworn, resumed the stand, was examined and testified further as follows:

Direct Examination (Resumed) by Mr. Sprecher.

Q. Mr. Appelbaum, would you tell us something about your educational background, please?

A. Well, I went to the University of Chicago. I received a Master's degree in business administration in 1950. I specialized in accounting.

Q. For how long had you been dealing with West Coast Mexican shrimp?

574 A. Since 1950, with the exception of my time in the Air Force.

Q. Have you ever personally purchased West Coast Mexican shrimp?

A. Yes, sir.

Q. Defendant's Exhibit 72 which contains the answers to the interrogatories contains a statement, Mr. Appelbaum:

(Reading) "Furthermore, Henry Appelbaum and/or Penguin Frozen Foods, being in the shrimp business, they should be well acquainted with the current market prices."

Is that true?

A. Yes, sir.

Q. Now, the basis of your experience with West Coast Mexican shrimp, are you familiar with their market prices?

A. Yes, sir.

Q. Are you familiar with the daily fishery production reports for the Chicago area of the Fish and Wild Life service of the United States Department of the Interior?

A. Extremely well, sir.

Q. Do those reports contain the market prices of frozen shrimp as reported by original receivers of shrimp?

A. Yes, sir.

Q. Have you examined the daily Chicago reports 575 from August 15, 1953, to August 15, 1954?

A. Yes, sir.

Q. Have you applied the market prices that you thus found to Reno production from August 15, 1953 to August 15, 1954, as that production is shown in Reno's answer to the interrogatories?

A. Yes, I did.

Q. What is the total amount which the volume of shrimp would sell at the market price?

A. $1,200,600.00.

Q. What is the profit which you would have received under your contract with Reno if it had not been terminated on that volume?

A. $84,000—

Mr. Kohn: If the Court please, I object to any arbitrary or summary conclusion like that. I don't believe the proper framework has been made first as to how that computation was made, if one was made, by the witness.

The Court: The contract is in evidence, isn't it?

Mr. Sprecher: Yes, it is.

The Court: That is a matter of argument.

The other figure he has testified to and it has been 576 received.

By Mr. Sprecher:

Q. Under that contract, the contracts which are in evidence as Plaintiff's Exhibits 1, 2 and 3, Mr. Appelbaum, what percentage would be applied to the price that you have mentioned before as the profit to Penguin under those contracts?

A. With letters of credit established by us, it would be seven percent.

The Court: Have you computed the seven percent of $1,200,600.00?

The Witness: I have, yes, sir.

The Court: Let him testify to that.

By Mr. Sprecher:

Q. What is that amount?

A. $84,252.00.

Q. After Reno stopped shipping shrimp to Penguin, did you continue to try to obtain West Coast Mexican shrimp?

A. Yes, sir.

Q. Did you stay in the frozen shrimp business insofar as you could?

A. Yes, sir.

Q. What profit did Penguin actually make from August 15, 1953, to August 15, 1954?

577 A. We lost over $50,000.00, sir.

Mr. Kohn: If the Court please, I move to strike the question and the answer because there is no showing that the Defendant did not engage in other business which would have a bearing on the profit.

In other words, that figure is not necessarily attributable to this West Coast Mexican shrimp supply.

The Court: Well, it is a matter of argument, anyway. For what it is worth, I will let it stand.

By Mr. Sprecher:

Q. Mr. Appelbaum, directing your attention to August, 1953, who were your largest customers for Reno shrimp, and where were they located?

A. Fisher Fish Company in New York, Liberty Fish Company in Philadelphia, Forman Beaton Company in Minneapolis, Victor Ventimeglia in Detroit. Those are about the four biggest.

Q. In August of 1953, how long had you had those as your customers?

A. Approximately three years.

Q. Did you have understandings with these cus-
578 tomers to sell them shrimp during the '53-'54 season?

Mr. Kohn: If the Court please, the question to the witness is, "Did you have understandings with certain customers to deliver shrimp?"

I want to object to the question on the ground that it is

vague, not specific, and does not call for an answer as to any definite obligations or commitments.

The Court: Well, it would be interminable if I told them to come in with all of their different negotiations with their various customers. In order to avoid that, I will let him answer this.

The Witness: Would you repeat the question?

The Court: Did you have commitments with your various customers?

By the Witness:

A. Yes, sir, we did.

By Mr. Sprecher:

Q. For the '53-'54 season?

A. Yes, sir.

Q. Were you able to supply them with Reno shrimp during that season?

A. No, sir.

579 Q. What did they do?

A. Three of them quit buying from us almost altogether, and the fourth cut his purchases, oh, I think he purchased about one-quarter from us that year of what he had the previous year.

Mr. Sprecher: Will you mark this Defendant's Exhibit 87 for identification.

(Document so marked.)

By Mr. Sprecher:

Q. Mr. Appelbaum, I show you this Defendant's Exhibit for identification 87 and ask you whether the figures which are shown on that exhibit were taken from the regular books and records of Penguin Frozen Foods?

A. Yes, they were.

Q. Were they prepared by you?

A. Yes.

Q. Are those figures accurate and correct?

A. Yes, sir.

Q. As shown by the books?

A. Yes, sir.

Mr. Sprecher: I offer in evidence Defendant's Exhibit 87.

Mr. Kohn: I will object to this on the ground that this is a self-serving statement from the Defendant's own

580 books, and it is hardly intelligible.

The Court: Hand it up.

What are you offering this for?

Mr. Sprecher: To show, your Honor, the largest customers in the way that their sales from Penguin dropped off during that '53-'54 season.

The Court: These are figures taken from the books of the Defendant?

Mr. Sprecher: Yes, they are, your Honor.

The Witness: Yes, sir.

Mr. Kohn: There may have been a lot of other reasons for it. Nothing shows—

The Court: That is a matter of argument. I received the audits that your accountant made of the Defendant's books, didn't I?

Mr. Kohn: That was made from the Defendant's books.

The Court: Yes, so is this. The objection is overruled. It will be received for what it is worth. It is a matter of argument if there were other causes for these losses. You can argue that to the jury.

(DEFENDANT'S EXHIBIT 87 was received in evidence.)

581 By Mr. Sprecher:

Q. Mr. Appelbaum, I show you Plaintiff's Exhibit 18, which is the audit statement of Mr. Olson, who testified here. I ask you to look at the item which is entitled "Storage and handling amount charged Reno in excess of amount paid for the period from February 28, 1953 to February 28, 1954." In the amount of $1,136.78 and ask you whether you will explain that to the jury, please?

A. Yes, sir. As a special concession to my father, because of all the business he had done with the cold storage and all the new customers he had secured for them, they charged us the fish rate instead of the shrimp rate. Therefore, this is—represents the difference.

Q. Was Reno charged the shrimp rate?

A. Yes, sir.

Q. Was that the correct rate for shrimp that would be charged to any storer of shrimp?

A. Yes, sir.

582 Q. Looking at the figure directly below that, a rebate of 12½ per cent on charges for the two years ended October 31, 1952, in the amount of $2,992.96, would you explain that to the Jury, please?

A. This also was a special concession to my dad for the same reason, because of securing customers for them.

Q. Now, I show you Defendant's Exhibit No. 1, which is a report dated March 31, 1953, by Penguin Frozen Foods to Reno, and ask you to explain a credit shown on the first page of that exhibit which reads as follows:

"Storage per audit, February 28, 1953, $1,442.98."

Would you explain that, please, to the Jury?

A. Yes, sir. The auditor from Reno came up and visited, visited us in February of '53, and after his audit we sat down together and after all of the papers that were made available to Mr. Olson were also made available to him, and we determined that this amount was due Reno as of the end of February, for the three years, for the entire period of the contract to that date for storage.

Q. In other words, that was adjusting figures?

A. Yes, sir.

Mr. Sprecher: You may cross-examine.

583 *Cross-Examination by Mr. Kohn.*

Q. Mr. Appelbaum, you said that beginning in 1950 you started to work in the shrimp business, is that correct?

A. Yes, sir.

Q. Until to date, is that correct?

A. Yes, sir, with the exception of my time in the air force.

Q. What would that be, two years?

A. It was about nineteen months, sir.

Q. About nineteen months?

A. Yes, sir.

Q. Now, are you familiar with the operation of your father's business during the 1953-1954 season, that is, beginning from August on—

A. Yes, sir.

Q. —until June or July of the next year?

A. Yes, sir.

Q. Are you aware of the fact that at the end of the year, 1953, there was an inventory of over $300,000 worth of shrimp?

A. Are you speaking of at the end of the season or at the end of the year?

Q. At the end of the fiscal, end of the calendar
584 year, 1953?

A. No, sir, I haven't—I don't know what the inventory was.

Q. You know that it was substantial?

A. We had inventory.

Q. You know that only a small part of it, approximately $12,000 was made up of shrimp acquired from the plaintiff? You know that, don't you?

A. I don't know for sure. If I could see our—

Q. If I would hand you a financial statement dated August 31, 1954, maybe that will refresh your recollection?

A. Yes, sir, it would help.

Q. Now that is not the exhibit—

Mr. Kohn: Is it, Mr. Sprecher?

Mr. Sprecher: No.

By the Witness:

A. This is of August. You are asking me of December or August?

By Mr. Kohn:

Q. I was asking you about the end of the year 1953?

A. Yes.

Q. Does that refresh your recollection? If it does not, I will produce another document.

A. Well, we had inventory. I couldn't give you the 585 exact amount.

Q. Would you say it was $200,000?

A. I would say that it was an approximate.

Q. At least that amount?

A. No, I wouldn't say that.

Q. Maybe you could double check it.

A. If you would give me a statement, if you have a statement.

Q. I think it shows on that statement. You are an accountant. You can figure it out better than I can. I mean, you have had accounting training, you told us.

A. Well—

Q. Look through this document.

A. Yes, sir. According to the statement here our inventory at the beginning, on January 1, 1954, was $322,000 —some odd dollars.

Q. You would say only ten or twelve thousand of that was Reno shrimp, is that correct, left over from the previous season?

A. I would have to see the statement, sir, to be sure.

Q. You have already said it would be only a small amount?

A. It would be a small per cent of the $322,000.

Q. Will you tell us where that other shrimp that made up the three hundred thousand dollar inventory came from?

586 A. Yes, sir. A lot of it was purchased from Prawns, Inc. A lot of it was purchased in Texas and a lot, some from Louisiana.

Q. Could you name any West Coast American shrimp firms that contributed to that supply?

A. All the shrimp we purchased from Prawns, Inc., were West Coast Mexican shrimp.

Q. How much would you say that was?

A. Oh, I would say at least half.

Q. You would say at least half?

A. Yes.

Q. Could you tell us when your first shipment of West Coast Mexican shrimp crossed the border from Mexico during that period between—

A. That we bought from Prawns?

Q. Yes. By the way, you own half of the stock of Prawns?

A. I own 51 per cent.

Q. That is spelled P-r-a-w-n-s?

A. Yes.

Q. Who owns the rest of the stock?

A. Mr. Lawrence Nagayama and Mrs. Stabortz.

Q. Does your father have any interest in the company?

A. No, sir.

Q. Did you contribute to the capital of the com-

587 pany in acquiring the stock?

A. Yes.

Q. With your own money?

A. Yes, sir.

Q. How much did you—

Mr. Sprecher: I object to that.

Mr. Kohn: I will withdraw the question.

By Mr. Kohn:

Q. Now, going back to this West Coast Mexican shrimp that you sold, or that you said made at least half of the inventory, as of the end of the year 1953, would you tell the Court and Jury when the first shipments of those shrimp crossed the border?

A. I believe the first crossed the border sometime in November, sir, November of '53.

Q. '53?

A. Yes.

Q. And how about the other shipments of shrimp that made up the other part of the inventory, excluding Crest —I mean Reno shrimp?

A. It was domestic shrimp, sir. It didn't cross the border.

Q. When did you acquire that?

A. The shrimp in inventory, offhand, I would say
588 in December, sir.

Q. In December. That West Coast Mexican shrimp was good shrimp, wasn't it?

A. Not all of it.

Q. You would not sell anything but good shrimp, would you?

A. We have to sell what we buy, sir, because once we buy it we are stuck with it.

Q. You would endeavor to get good shrimp, would you not?

A. We endeavored to get the best we could.

Q. Well now, are you familiar with the earnings of the defendant during the season beginning October, 1953, and ending the first of July, 1954?

A. Yes, sir.

Q. Well, during that period, wasn't the market in an unusual condition in that there were sudden drops in the market?

A. The market of shrimp business is always unusual, but there were sudden drops, and rises, too.

Q. When was that?

A. Well, the market changes every day in the shrimp business, sir.

Q. There was no outstanding unusual drop at a particular time?

A. Not in that period.

589 Q. Now, in making your computation, as I understand it, you took the figures of United States Fishery and Wild Life Service for the Chicago area?

A. Yes.

Q. Then you took what it cost you and subtracted that from the market price during the period in question, is that correct?

A. No, sir.

Q. How did you make the computations? Will you tell us how you made them?

A. Yes, sir. I took the price as given by the Fish and Wild Life Service in Chicago, figured out an average price for size and grade according, during that period, and applied it to the answer given to the interrogatory from Reno.

Q. Well now, does the Fish and Wild Life report show that the identical type, sizes, colors, qualities of shrimp as packed by Reno?

A. They show West Coast Mexican shrimp, sir.

Q. But no specific description which is exactly comparable to the Reno shrimp, is that right?

A. They don't show Reno shrimp.

Q. No similar description of type of shrimp? There are different types of shrimp, are there not?

590 A. There is West Coast Mexican shrimp. There is domestic shrimp.

Q. Any further categories and descriptions?

A. Not in the Chicago report, as I recall.

Q. Now, Mr. Appelbaum, you said that you were in the shrimp business from 1950 on except for nineteen months in the Army, is that right?

A. Air Force.

Q. What period of time were you out of the Air Force, I mean in the Air Force, I mean the exact year?

A. From March of '51 to October or November of '52.

Q. From March, '51 to November—

A. October or November. I can look in my pocket.

Q. All right. Let us take the period when you returned. Did you return and work with the defendant beginning in November, '52?

A. Yes, sir.

Q. Were you familiar with the prices charged by the defendant during the period of November, '52, until the end of the season, until the end of June, '53?

A. You mean the prices we sold Reno shrimp for?

Q. Yes, sir.

A. Yes, sir.

Q. Do you know how they compared with the quota-
591 tions furnished by the United States Wild Life and Fish Bureau?

A. No, sir.

Q. You made no such investigation?

A. No, sir.

Q. Now, Mr. Appelbaum, isn't it a matter of fact that these figures that you have given us today furnished by this Bureau are merely quotations of the sellers and not necessarily the prices at which sales are closed in this area?

A. Well, they are quotations by the original receivers in Chicago.

Q. Isn't it a fact, Mr. Appelbaum, that the sales are not actually or necessarily made at those prices that you are trying to give us here today?

A. No, sir, not necessarily.

Q. What does your company do with regard to fixing of sale prices of shrimp?

A. We sell them at the highest price we think we can get for them.

Q. Which may not necessarily be the figures quoted by the Bureau, is that correct?

A. Not necessarily, sir.

Q. In many cases?

A. I don't look at those reports.

592 Q. You don't know, do you?

A. When I see them.

Q. You don't know, do you, whether these quotations actually reflect the sales price?

A. No.

Q. Do you report the selling price to the Government?

A. On occasion, sir.

Q. On occasion?

A. Yes.

Q. Only on occasion?

A. Whenever they ask.

Q. That is right. All right. You have seen the information furnished by the plaintiff showing the types of shrimp that it produced in 1953-1954 season, did you not?

A. Yes.

Q. You know they are listed as follows: "Class Y Medida, Mark, Brown, Brown C Vena Verde, Brown De 2A, Pelado 5 lbs., Pelado 3 lbs."

What do those represent?

A. Which?

Q. Those designations that I have just read?

A. Different categories of shrimp.

Q. Different qualities?

A. Well, more different colors.

593 Q. Different colors?

A. Different colors, and in some cases different qualities.

Q. Are those categories represented in some way by the quoted prices furnished by the Wild Life Bureau?

A. Yes. Where there is a spread on the price published by the Fish and Wild Life Service in many cases.

Q. In other words, they do have these categories?

A. They don't specifically list them. They list brown shrimp, sir, and white shrimp, sir, which are part of what you read off to me. Then in many cases when they list the prices they will have a spread.

Q. Now, you notice I read seven categories?

A. Yes.

Q. But in your—

A. Only five, sir. The other two are for peeled shrimp.

Q. How many did you list?

A. I listed the same. I went right down, sir.

Q. Mr. Appelbaum, calling your attention to Plaintiff's Exhibit No. 18, you commented on the $1,136.70 item; did you not on or about June 1st, discuss this with Mr. Olson, the auditor that we sent in?

A. Yes, sir.

Q. Did you not tell him that you thought that was
594 a proper adjustment that could be made in Plaintiff's favor?

A. I told Mr. Olson that was an excess charged Reno over what we actually paid.

Q. In other words, that Reno was charged for more than it should have been charged it, is that right?

A. No, sir, I did not say that. I said that Reno was charged more than we actually paid.

Q. Well now, under the contract, were you not supposed to give the plaintiff the benefit of any savings you made? And that you were only to charge the plaintiff what was actually spent?

Mr. Sprecher: I object. I object to that because the contract speaks for itself.

The Court: Yes. I permitted you on direct examination. However, that the witness state what the contract provided. So I will give him the same privilege on cross. Overruled.

Mr. Kohn: Would you read the question, Mr. Reporter?

(Last question read as recorded above.)

By Mr. Kohn:

Q. An item that you charged the plaintiff?

A. I am not sure whether we were or were not, sir.

Q. You didn't?

595 A. No, we didn't.

Q. You made no such admission to Mr. Olson?

A. Oh, I just told Mr. Olson what I told you.

Q. Repeat that.

A. It was in excess of, over what we actually paid for storage because we were charged the fish rate. I don't know if I told him it was at the fish rate. It was in excess of what we paid for the storage over—in excess over what we charged Reno, over what we actually paid cold storage.

Q. I want to call your attention again to a provision of the contract at page 7, which indicates that the report that you were to file each month would indicate the aggregate amount of freight charges, icing expenses, handling charges, and so forth in connection with the transportation of shrimp paid or incurred by buyer.

Now, in view of that provision in the contract, do you want to change your previous answer?

A. No, sir. We charged Reno at an estimated storage rate because we would receive the storage bills two to three weeks after the end of the month, and they wanted their report sooner. So we were charging them based on the published shrimp rate, an estimated charge as explained in each report that I sent to Reno.

596 Q. And then when the charges were actually known you made readjustments from time to time, is that not correct?

A. The only adjustment we made was in February—on the March report of '53, and then there were no other adjustments made.

Q. Now, calling your attention to the other item on Plaintiff's Exhibit 18, which is rebate on storage charges of 12 per cent, totaling $2,992.96, did you not on or about June 1st, tell Mr. Olson in your office that at least as to part of that figure there should now be an adjustment in favor of the plaintiff?

A. I told Mr. Olson that I was going to get married this week; that he came up—

Q. That is quite an adjustment.

A. He came up with about five thousand dollars worth of items he was in question about.

I said to save time, so he can get out of here, and I can get out to California where I am going to be married, but we would agree to a settlement in which we would include the charge after March of—March 1st of '54, which would approximately split in half the amount he was uncertain about.

Q. You discussed with Mr. Olson the $4,800 deduction on account of breading transaction?

597 A. No, sir. Oh, we might have mentioned it just in passing. He might have asked what it was and I told him that it spoke for itself.

Q. Did you discuss with Mr. Olson the possible adjustment for trucking and insurance amounting to $350.00?

A. Yes, sir.

Q. Will you tell us when and where?

A. In our office, sir, when he audited the books.

Q. Prior to June 2nd?

A. I guess so.

Q. What did he say and what did you say?

A. He said he wasn't sure whether we had ever charged Reno, and I said I wasn't sure whether it had ever been charged to Reno.

Q. Is that all?

A. Yes.

Q. Did you also discuss with him at that same time a figure of $1,743.90 for storage and handling prior to March 1, 1953?

A. Yes, sir.

Q. What did you say and what did he say?

A. I said—he asked me about it, and I said it was part of that adjustment when we paid that $1,400 in—on the March report of '53.

Q. Going back to the—

598 A. March report of '54, I think it is.

Q. Going back to the 1953-1954 season, your profits for that period would be reflected in your financial statement for the entire year 1954, is that correct?

A. Well, I do not believe so because in 19 in April of 195 let us see. Well, the contract period, I believe the eight-month interim statement would be much more appropriate in this case.

Q. For what period would that be, eight months ending August 31, 1954?

A. Yes, sir.

Q. Would you refer to that, please? I believe I have it here. Would you look at that column?

A. Yes, sir.

Q. Looking at that document, could you tell us your profits for the entire year 1954?

A. We lost $54,137.35.

Q. For the entire year?

A. No, excuse me, for the eight months.

Q. For the eight months?

A. Yes.

Q. Now, tell us for the entire year.

A. I don't know, sir.

Q. Do you have those figures here, do you not?

599 A. I don't have them here.

Q. You were in charge of the books?

A. I have them in Chicago.

Q. Can't you give us a rough idea?

A. No, sir.

Mr. Sprecher: Your Honor, I am going to object to that for this reason: that the period involved is August 15, 1953, to August 15, 1954, and what happened after August 15, 1954, does not relate to this matter at all.

The Court: Objection overruled.

By Mr. Kohn:

Q. Answer that question. I think it is clear. You seem to know so much about the books.

Mr. Kohn: Will you read the question, Mr. Reporter? (Last question read as recorded above.)

By Mr. Kohn:

Q. Isn't it a fact that you made a profit for the entire year?

A. After my father's salary was reduced and after adjustments were taken, such as the fifteen thousand off this one hundred ninety-eight for taxes.

Q. What fifteen thousand dollar adjustment?

600 A. For tax reasons. We made several adjustments that we considered were considered all right by the Internal Revenue Department.

Q. Well, would those adjustments have any bearing on whether or not you made any money for that entire year?

A. Yes, sir.

Q. Isn't it a fact that your shrimp that you sold during the entire year, that is the entire year 1954 was ac-

quired early in the year between August and the preceding October and November?

A. The shrimp we made money on after August, from August to December, the majority, I would say close to 80 or 90 per cent, if not more, were purchased after August, 1954. We did make quite a bit of money after that.

Q. How about the inventory you had on hand, if you will look at the document in your possession there, you had an inventory of one hundred seventy some odd thousand dollars. That was made up of shrimp acquired prior to the close of the '53-'54 shrimp season, was it not?

A. Yes, sir. That was prior to August 31st.

Q. Most of that shrimp was subsequently sold between August 31st and the end of the year, was it not?

A. Yes, sir.

Q. Do you know what the profit was for those four
601 months, roughly?

A. For the year, I think we came up with a profit of a few thousand dollars.

Q. It was more than enough to wipe out the loss you have indicated?

A. With the adjustments made, sir.

Q. That was the income after it was reported to the Government, is that right?

The Court: We will take a recess for ten minutes.

602 The Court: You may proceed with your cross-examination.

Cross-Examination by Mr. Kohn.

Q. Mr. Appelbaum, during the '53-'54 season, did the Defendant firm buy for its own account rather than as broker or agent shrimp?

A. Yes, sir.

Q. Under such an arrangement the firm then would take the risk of market fluctuations, would it not?

A. Yes, sir.

Q. When did you make your first purchase of shrimp in the Fall of 1953?

A. I believe in November, sir.

In November, 1953.

Q. When did you put your first order in?

A. We don't put orders in.

Q. You said the first shipment was in November, I believe, on your previous testimony.

A. That is when we buy. We don't put orders in to buy shrimp, sir.

Q. How do you buy shrimp?

A. Somebody will offer us shrimp at a specific
603 price, and we will say yes or no.

Q. When you say or you said half of your shrimp came from your own Company, Prawns, did you not?

A. No, sir. We bought it from Prawns.

Q. That is what I mean.

A. Yes, sir.

Q. You bought half of them?

A. Yes, sir.

Q. Is Prawns in the business of selling shrimp to anyone?

A. To anyone, yes, sir.

Q. Were those shrimp you bought through Prawns West Coast Mexican shrimp, were they comparable to Reno shrimp?

A. I would say not, sir.

Q. In what respect did they differ?

A. They did not have the uniformity of pack that we were able to get through Reno, because Prawns bought where they could. We did have trouble of short weight.

Q. Well, this West Coast Mexican shrimp came from the same area, did it not, as Reno?

A. It came from the West Coast of Mexico, if you consider that the same area.

Q. Did you buy those shrimp through Prawns at the market price then prevailing?

604 A. We bought them at the prices that we were quoted by Prawns by Mrs. Sabel, who was the buyer for Prawns.

Q. Did it make any difference that you owned more than half the stock of Prawns, in the quotations that were given to you?

A. No, sir. The Company was being run by Mrs. Sabel and Mr. Nagayama.

Q. It was an arm's length transaction?

A. I don't know what you mean by "arm's length."

Q. That is, you dealt as strangers in the price of shrimp?

A. That is right, sir.

Q. Then where did the other half of your portions of your shrimp for that season come from in addition to that acquired from Prawns?

A. Texas, Louisiana.

Q. Can you tell me what the total quantity of shrimp acquired by the Defendant during '53-'54 season amounted to?

A. Well, sir, not without referring to a statement.

Q. In your Exhibit 85, you used a figure of a million and a half pounds for the purpose of computation, did you not?

A. I don't know what Exhibit 85 is.

605 Yes, sir, a little over a million and a half pounds.

Q. Would you say that the total shrimp handled by you during the '53-'54 season was less or more than a rough figure of a million and a half pounds?

A. Gee, I have no idea without referring to the statement.

Q. Isn't it a fact in the '53-'54 season you handled considerably more pounds of shrimp than you did in previous seasons?

A. Offhand I would say in the '53-'54 season we handled less but I would not swear to it.

Q. Can you tell the court and jury if you handled more or less than the rough million and a half figure, that million five hundred pound figure that is in your Exhibit 86?

A. I couldn't tell for sure without referring to a statement, because it would be—it would not be accurate.

Q. You are familiar with the books?

A. Yes, sir.

Q. Would you say it was about the same?

A. Offhand I would say as I said it was less.

Q. How much less?

606 A. I would have to refer to the statement, sir.

Q. If I showed you a statement that indicated it was more than—

A. I would certainly tell you.

Q. You cannot say definitely it was not mere, is that correct?

A. I would not say it was more.

Q. What was the total volumes of sales in the '53-'54 season of shrimp?

A. Again I would have to refer to a statement.

Q. You have no idea of how it compared with the previous season?

A. No, sir. We keep our records on a year to year date. The only reason we are interested in the '53-'54 season as such is because we were trying to figure how

much we lost in that period because of our losing Reno's shrimp.

Q. You were determined to find out some way of figuring a computation—

A. Yes, sir, for this trial.

Q. (Continuing.) —that would show a loss, is that right?

A. No, sir. We knew we lost, and we wanted to figure out the exact amount.

607 Q. But you won't deny that you handled a greater volume of shrimp—

A. I don't say we did.

Q. You won't deny that you did not have a greater volume of business?

A. I don't believe we did.

Q. You don't believe you did. Did you check that? Could you check that with any document that you have at this session?

A. If you give me a statement, the 8-month statement of August.

Q. All right, sir.

While we are looking for that, you stated that in making this final computation of what the profits would have been, you figured on a 7 per cent basis, did you not?

A. Yes, sir.

Q. Why didn't you figure it on a basis 5 per cent basis?

A. Because Mr. Pinson's testimony, as well as testimony that has been brought out, was agreed we reverted to the 7 per cent basis.

Q. But you know very well that the contract provided for an option of 5 per cent or 7 per cent depending on how the financing was done, isn't that correct?

608 A. Yes, sir.

Q. It was possible, was it not, that you would not have to do the financing in a great many cases, and would only figure at a five per cent commission, is that right?

A. They asked us to do financing for the '53-'54 season.

Q. But you had a right to decline to do it, did you not?

A. No, sir.

Q. Are you familiar with the terms of the extension agreement?

A. Yes, sir.

Q. That provided for either a 5 per cent commission, if you did not handle the financing, or 7 per cent if you did?

A. Right.

Q. Isn't it true, Mr. Appelbaum, that it was possible had the sales been made pursuant to that agreement your commission in many cases would only have been 5 per cent?

A. In my best recollection, sir, the only option rested with Reno as to what it was. It was on a seasonal basis.

Q. Reno could have decided whether or not you should finance it or they should finance it, is that what you mean?

609 A. That is right.

Q. Now, in quoting prices to your customers, did you at any time in your experience in the shrimp business consult the quotations of the United States Wild Life and Fishery Bureau in Chicago?

A. Oh, I imagine sometime I must have.

Q. Well now, in selling the shrimp that you bought through Prawns during the '53-'54 season, did you consult the United States Bureau figures before you made those sales?

A. Occasionally.

Q. Do you know how your sale prices compared with the Government figures?

A. No, sir.

Q. Now, do you remember in 1954, May, your father gave a deposition in my office. You were present, were you not?

A. Yes, sir. I think it was May.

Q. Do you recall whether or not he stated that the books of your Company showed that the Plaintiff had a credit of $198,000.00 on account of shipments made?

A. Yes.

Q. Do you recall that figure?

A. Yes.

610 Q. That is what your books show, is that correct, as far as credit is concerned?

A. Yes.

Q. Do you remember on direct examination I asked you about the drop in the shrimp market and you said you did not recall such outstanding drop at any one particular time in the '53-'54 season?

A. The only outstanding drop that I remember was in June of 1953, which is prior to the time of that extension.

Q. You were present at that deposition, and maybe if you thumb through, and I will let you read your father's testimony, and maybe that will refresh your recollection

A. Just this one page?

Q. You could run on to another page. Where the pages are turned back. It is pages 70 and 71.

Mr. Sprecher: Your Honor, I must object to this because I think it is outside the scope of the direct examination, and certainly going afield.

The Court: There is no question before him now. He is just giving him a document to refresh his recollection. Now, if he asks a question, I will hear an objection to it, but I don't know what I can rule on at this point.

611 By Mr. Kohn:

Q. Does that refresh your recollection any?

A. No, I was fully aware of that, sir.

Q. I will ask you again, was there any outstanding drop in the market price of shrimp during the '53-'54 season?

A. By the word "outstanding", the answer would be no.

Q. Was there any unusual decline?

A. No, sir, I don't think—the answer is no.

Q. Well, I will ask you again if there was a break in the market price in January, 1954?

A. There could have been a break and an increase, probably there were both.

Q. Is it true that the market price declined for a typical item, let us say, from ninety cents to seventy-five cents during that period?

A. What period, sir?

Q. Between the period from December, 1953 to March, 1954?

A. Oh, yes, that is quite possible.

Q. All right. Mr. Appelbaum, when you said that there were commitments made for Reno shrimp, did you mean the Reno brand?

A. Yes, sir.

612 Q. Are you aware of the provision in the contract—Are you aware, under the provisions of the contract, there was no requirement as to brand?

A. No, sir, I was not aware of that.

Q. And referring to these commitments, you will recall your father testified that the commitments were by word of mouth, is that correct?

A. Definitely.

Q. There are no written commitments?

A. No, sir.

Q. No commitments for any specific quantity?

A. As far as specific quantity, I don't know whether there were or there weren't, sir.

Q. No specific prices?

A. No.

Q. Is that correct?

A. Definitely, sir.

Q. You could not tell that far in advance, could you?

A. No, you can't tell.

Q. Or as to quantity, either, is that correct?

A. It was stipulated Reno shrimp, sir.

Q. Well, are you now prepared to give us the figures relating to the profits of your father's firm for the entire year, 1954?

613 A. Yes, sir.

Q. What were they?

A. Approximately $4,400.00.

Q. How is that evidenced?

Mr. Sprecher: Your Honor, I object for the same reason that I did before. That this is for a year that goes four months beyond the period.

The Court: Your objection is again overruled.

By Mr. Kohn:

Q. Were there any unusual expenses incurred during the year 1954 that were unlike any occurred in the previous years?

A. Not to my recollection, sir.

Q. Did you hire any new employees during 1954, during the '53-'54 shrimp season?

A. '53-'54 shrimp season? Yes, sir.

Q. Who were they?

A. Mr. Sid Greene was hired.

Q. Anyone else?

A. We did not hire anyone else, sir.

Q. Did you engage any more expanded advertising program during that period?

A. Again, I am at a loss when you speak of a "period".

614 Q. The season beginning October, 1953, until the end of June or July of 1954?

A. No, sir. I don't believe we expanded our advertising.

Q. Now, did that $15,000.00 item that you said was an adjustment for tax purposes, had that adjustment not been

made, would your profits been $19,000.00 or would they have been $11,000.00?

A. Without the adjustment?

Q. Yes.

A. We would have lost $11,000.00.

Q. You would have lost $11,000.00?

A. Yes.

Mr Kohn: You may redirect.

Redirect Examination by Mr. Sprecher.

Q. Mr. Appelbaum, wh[illegible]id Penguin finally sell out all of Reno's shrimp it had o[illegible]d at the time the shipments stopped coming from Mexico?

A. In February, 1954.

Q. Were any of the profits that you have said that were made after August 15, 1954, made on the sale of Reno shrimp?

A. They couldn't have been. We did not have any.

615 Q. What is the profit that was made in the last four months of 1954 made on West Coast Mexican shrimp?

A. I would say 10 per cent or less.

Q. What was the other kind of shrimp you were handling?

A. At that time with the hiring of Mr. Sidney Green, we went into domestic shrimp on a very heavy basis to—first of all, we couldn't make money on West Coast Mexican shrimp.

Mr. Kohn: I move to strike that answer. I don't believe it is responsive to the question.

The Court: Your motion is denied.

By Mr. Sprecher:

Q. Based on your experience in the shrimp business, Mr. Appelbaum, would you say that the same customers consumed domestic shrimp that consumed West Coast Mexican shrimp?

Mr. Kohn: I object to that. It is a purely hypothetical conjecture.

The Court: The objection is overruled.

By the Witness:

A. Yes, sir.

By Mr. Sprecher:

Q. Under the Reno contract, was there any risk of market fluctuations that Penguin would absorb?

616 A. No, sir.

Q. Was it possible for Penguin to lose money under the Reno contract?

A. No, not as far as gross profits, sir.

Q. Now, Mr. Kohn showed you Exhibits which have been marked for identification as 85 and 86. Is it true those relate to a survey of market prices which you made from the San Pedro reports of the Wild Life Bureau?

A. Yes, sir.

Q. Is there any marked difference between the prices in San Pedro of the Chicago area as you testified originally?

A. I did not compare the two prices, sir.

Q. I mean the total figure you got. Was it very diverse or was it comparable?

A. I think there was some difference, but it was not too much.

617 Q. Would you read the amount that you obtained there from San Pedro?

A. $1,248,693.03.

Q. What is seven per cent of that figure?

A. $87,408.51.

Q. So the difference in the two markets was between eighty-four thousand and some odd dollars and eighty-seven thousand dollars?

A. Yes, sir.

Q. Mr. Appelbaum, Mr. Kohn asked you while you were looking at that, he says this refers to a million and a half shrimp.

Mr. Kohn: Pounds.

The Witness: Pounds.

By Mr. Sprecher:

Q. Pounds of shrimp.

Where does that figure come from, do you know?

A. That comes from Reno's answers to the deposition, that amount of shrimp that packed.

Q. In other words, that was Reno's sales to Crest, rather than—that doesn't refer to Penguin sales?

A. No. That was the amount of shrimp Reno packed in the year that they—1953-1954.

Mr. Sprecher: That is all.

618 The Court: Any recross?

Mr. Kohn: No.

The Court: That is all. You may step down.

(Witness excused.)

The Court: Further evidence on behalf of the defendant and counter-claimant?

Mr. Sprecher: Your Honor, I would like now to introduce in evidence Defendant's Exhibit 77, or at least be able to read one paragraph of that exhibit.

The Court: Is that the paragraph we discussed this morning before the jury came in?

Mr. Sprecher: Yes, your Honor.

The Court: You may read it at this time.

Mr. Kohn: If the Court please, this would be a good point to interrupt. With the permission of Counsel on both sides, two witnesses are in the court room that have not been excluded. One is Mr. Clinton and Mr. Olson may come back on rebuttal.

The Court: Very well.

Mr. Sprecher: I am reading one paragraph from a deposition of Oliver L. Morton, taken on March 1, 1955, in San Francisco. It reads as follows:

"Can we stipulate that in the control document files of the Bank of America for Nacional Financiera it is indicated that the borrower is Nacional Financiera and

619 that there is contained in the folder the by-laws of Crest Importing Company, Inc., this document which I have introduced?"

Your Honor, I would like also to introduce into evidence at this time Defendant's Exhibits 78, 79, 80, 82, 83 and 84.

The Court: They may be received. Those are the ones we discussed this morning.

Mr. Sprecher: They are, your Honor.

The Court: They may be received.

(Said documents so offered and received in evidence were marked DEFENDANT'S EXHIBITS NOS. 78, 79, 80, 82, 83 and 84.)

Mr. Kohn: And the record will show the same objections that were made?

The Court: Yes. They have been overruled.

Mr. Sprecher: Defendant's Exhibit No. 78 reads as follows:

"August 7, 1953

"Nacional Financiera S. A.
Venustiano Carranza No. 25
Mexico, D. F., Mexico

"Attention: Mr. Raul Martinez Ostes,
Sub-Director

"Gentlemen:

"During the past two days we have had the pleasure
620 of a visit from Mr. Oscar Fraustro Martinez. We have discussed the details of our line of credit with him and the gentleman representing the individual packers making up the group of shrimp packers which you are sponsoring.

"At the suggestion of your representative, I am pleased to outline the conditions under which this facility will be available to your good selves.

"The line of credit which we hold at your disposal for financing shrimp will remain, as formerly, $1,700,000. However, the sub-limit within the facility will be increased from $200,000 to $300,000. In case the entire $300,000 pre-season facility is used by your good selves, reimbursement will be made to us at the rate of 7½¢ per pound of all shrimp shipped. If less than $300,000 is borrowed against pre-season notes, then the reimbursement may be less than 7½¢ per pound on certain shipments. It is understood that any unpaid balance remaining on the notes representing the pre-season financing will be charged to your esteemed account on June 30, 1954.

"It is a pleasure to express our agreement to the suggestion that shipments to be financed under this facility
be made on straight bills of lading consigend to Crest
621 Importing Company. These documents will be released to Crest under a Trust Receipt. It is understood that if any shrimp is unsold at the maturity of the relative acceptance, the financing may be carried for an additional 90 days on a note basis, upon surrender to us of the warehouse receipt, which we will release to Crest against a Trust Receipt.

"Our advances will be for 75% of the invoice value of the merchandise. We understand that the shrimp will be invoiced in accordance with prevailing market prices, and

that the original documents sent to us will include a draft on Crest, drawn at 90 days sight for 75% of the invoice value. The documents will be released to Crest upon acceptance of this draft and signature of a Trust Receipt.

"Our acceptance commission and discount, amount to 4½% per annum, will be charged to Crest Importing Company, San Diego. Accordingly, the face amount of the drafts for 75% of invoice value will be credited to the account of Nacional Financiera. In accordance with your request, interest at 4½% per annum on the notes representing pre-season financing will be charged monthly to the account of Nacional Financiera under advice.

622 "In order that we may be in complete agreement regarding the modus operandi of this facility, I would like to outline the handling of the hypothetical transaction as we envisage it.

"The Nacional Financiera will wire us in San Francisco confirming that documents covering say $30,000 invoice value of shrimp are being sent to our San Diego Office, accompanied by a draft on Crest Importing Company representing 75% of the value, or $22,500. We will immediately fill in one of the blank drafts which we hold in safekeeping for Nacional Financiera, applying the reference 'BA8'. The amount will be $22,500 and the usance may be any period up to 90 days. This draft will be accepted and discounted, the 4½% p. a. financing charge being debited to Crest Importing Company at our San Diego Office, and the face amount or $22,500 will be credited to the account of Nacional Financiera here.

"In the meantime, the documents are to be air mailed by you direct to our San Diego Office. When they arrive our said office will place the collection for $22,500 on
623 its books, and deliver the documents to Crest against Trust Receipt and acceptance of the accompanying draft at 90 days sight for $22,500. This completes the first step of each transaction.

"Not later than one day before the maturity of this draft (in case the relative shipment has not been sold, the warehousing procedure mentioned previously will apply), Crest will pay to our San Diego Main Office a sum representing approximately 88% of the invoiced value of the shipment, accompanying its remittance by a schedule showing application of the funds as follows:

(1) $22,500 to pay Nacional Financiera's draft accepted by the Bank of America.

(2) $..... representing 2½¢, 5¢ or 7½¢ per pound of shrimp to be applied against the pre-season financing.

(3) $..... balance to be credited to the account of Nacional Financiera under advice to them and to Crest.

"A mutually satisfactory arrangement will be discussed with Crest Importing Company to make the acceptance method of financing as economical as possible for your 624 good selves. We believe that the foregoing summarizes the conditions governing this arrangement as concluded during our discussions. If you have any comments or suggestions we will be happy to receive them, in order that this facility may be of benefit to all the parties concerned.

"Your excellent cooperation in all matters pertaining to our relationship is highly appreciated, and we wish to cooperate to the fullest extent.

"Very sincerely yours,

"Henry W. Drath,
"*Vice President.*"

Exhibit 79 is a letter on the stationery of the Bank of America dated March 4, 1953, to:

"Mr. Henry W. Drath
Vice President
Bank of America National Trust & S. A.
International Banking Department
300 Montgomery Street
San Francisco, Cal.

"Dear Henry:

"The Government of Mexico is making an effort to organize, on sound commercial basis, the exportation of 625 shrimp which up to now has been handled in a chaotic manner.

"The project includes to group under Nacional Financiera, which already controls Refrigeradora del Noroeste, S. A., most of the shrimp fishermen, packers and exporters, after this rationalize the fishing and the distribution of the existing facilities. As a matter of fact the Pacific coast has now a surplus of freezing plants while the Mexican shrimp is sold alive and smuggled to Texas fishing boats for lack of refrigerating plants in Campeche.

"Nacional Financiera also plans the organization of an

United States Corporation to be managed by an American citizen, which will have the job of distributing the Mexican shrimp through all the year by means of warehousing inventories in cities like San Francisco, Los Angeles, Chicago, New York, Philadelphia and San Louis Missouri. This not only will reduce cost of sales of the Mexican shrimp but will also bring an increase in the price for the product which is now sold by competing Mexican interests to one or two single buyers in the United States."

I will not read the rest unless Counsil desires me to
626 do that.

Exhibit 80 is on the letterhead of the Bank of ..merica, dated August 4, 1953, addressed to Mr. Drath, and reads as follows:

"You have an appointment, August 5th, at 2:30 P. M. with Jack Ellis and representatives of the Crest Importing Company, Inc. and the Nacional Financiera, S. A. They were here today and provided us with signature cards for the account which was established on July 13th.

"Just in case you have not been informed, the gentlemen who will be calling on you tomorrow are:

"Oscar Fraustro, C. P. T.
Contralor General
Nacional Financiera, S. A.

"Isaac Coppel
Olas Altas Y Angel Flores, Mazatlan

"Pedro L. Pinson
Colonia de los Pinos, Mazatlan

"Arturo De Cima
Venustiano Carranze 76, Mazatlan.

"The latter three gentlemen represent the Crest Im-
627 porting Co., Inc. and each are shrimp producers.

"They hope to retain their bank account in San Diego as their headquarters will be here. They also hope to work out with you, a procedure whereby advances on drafts can be handled through this office.

"We shall be glad to cooperate in any way possible, and if you feel that we can handle the negotiations of the drafts, sending them to you on a cash letter or in any way you wish, we shall be glad to do so.

"Sincerely yours,

"K. A. Nairne,
"*Vice President.*"

Exhibit 84 is dated August 9, 1952, and it is on the letterhead of the Nacional Financiera. This is in the Spanish language. I am reading the translation prepared by the Bank of America.

"We have been advised that Refrigeradora del Noroeste, S. A., has solicited a credit from your institution.

"In case such credit is granted, we wish to inform you that regarding note No. 1 dated August 7 and maturing May 31st for $120,000.00, if at maturity any amount still remains outstanding we authorize you to charge our
628 account with your institution.

"With regards to the credit for $380,000.00 which should be liquidated at the close of the 1952-53 shrimp season, which generally ends by August 31st, we authorize you to also charge our account with any amount that is outstanding on that date.

"We remain,

"Yours sincerely,

"Nacional Financiera, S. A."

When I read that stipulation, Exhibit 77, I neglected also to read Mr. Kohn's answer:

"We can stipulate."

Your Honor, we have here the Willis' documents which we have now sorted out and we want to introduce them as part of our case.

The Court: Weren't you going to go over those over the noon hour?

Mr. Sprecher: Yes.

The Court: You have nothing else with which to proceed at this time?

Mr. Sprecher: We have another witness.

The Court: We can go ahead with him.

Mr. Sprecher: Yes.

The Court: It would save considerable court time
629 and you can go over these documents over the noon hour.

STANFORD CLINTON, called as a witness on behalf of the defendant herein, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Clayton.

Q. Your name is what?
A. Stanford Clinton.
Q. Your business or profession is what, sir?
A. I am a lawyer.
Q. Your office is located where?
A. At 134 North LaSalle Street, Chicago, Illinois.
Q. With whom are you associated at that address?
A. I am a member of the law firm of Pritzker, Pritzker & Clinton.
Q. Are you a member of the Chicago and Illinois Bar?
A. Yes, sir, I am.
Q. How long have you been practicing in the State of Illinois?
A. Since June, 1931.
Q. Do you know the defendant, Henry Appelbaum?
A. Yes, sir, I do.
Q. Have you had occasion to represent him in his business?
630 A. Yes, I have.
Q. In the month of September, 1953, did you have occasion to go to the office of Mr. Appelbaum in connection with the conference that was being held between Attorney Collenburg, Mr. Willis, Mr. Fraustro and Mr. Appelbaum?
A. Yes. There was one other person present.
Q. Who was that?
A. That was Robert Appelbaum.
Q. That was the gentleman that just finished testifying?
A. Did you say attorney?
Q. Attorney Collenburg?
A. Mr. Collenburg and myself, as I recall it, were the attorneys present, yes, sir.
Q. Now, after the conference, did you go to Mexico City, after you had seen them in the office, did you—
Mr. Clayton: I will withdraw that.

By Mr. Clayton:

Q. Did you go to Mexico City?
A. Yes, sir, I did.

Q. When did you go to Mexico City?

A. Well, I arrived there—I can fix it—May 23rd was a Monday, 1955, and I arrived there the previous Friday night from Los Angeles about midnight.

Q. By the way, did you ever have occasion to
631 meet or did you know at that time Mr. Jose Saenz?

A. I did not know him and I had not met him previous to that trip.

Q. At the time that you went to Mexico City, did you have occasion to meet him?

A. Yes, I did.

Q. And did you have occasion to discuss with him in Mexico City at that time the matter pertaining to the plaintiff, Reno, and the defendant, and the attempted cancellation and the attempted reinstatement of that contract?

A. Yes, I did.

Q. Would you tell the Court and Jury what Mr. Saenz said to you in respect to this matter with the intention of Reno, and what you said to him?

Mr. Kohn: If the Court please, I want to object to the question and any answer along that line for the reason that Mr. Saenz is no longer connected with the plaintiff corporation or Nacional Financiera.

Is that correct?

And this seems to be a most unusual way of proving admission when a person whose statement, I presume
632 they are going to rely on, is no longer connected with the plaintiff.

The Court: This is at a time when the case was on the trial call in this court, May of 1955, a conversation by one of the attorneys of record for the defendant with a former officer of the plaintiff. It would seem to me to be hearsay of the rankest kind. On what theory can I receive such conversation?

Mr. Clayton: The conversation with reference to a matter that transpired to the time that the—well, at the time he was an officer or director of the corporation.

The Court: Objection sustained, certainly. I would consider it highly improper. Sustained.

Mr. Clayton: That is all.

Mr. Kohn: No cross examination.

(Witness excused.)

Mr. Kohn: If the Court please, in order to save time, we are going to have to argue the question of admission of

these documents. I don't think we are going to save any time with delaying it any further. With the proffered evidence that he has in mind, I would suggest he do it now.

Mr. Sprecher: I can do it now.

Mr. Kohn: We can do it out of the presence of the Jury.

633 The Court: Proceed to offer them then, unless you have something else to do.

Mr. Sprecher: These are documents received out of the files of Mr. Willis.

The Court: In obedience to the subpoena duces tecum?

Mr. Sprecher: Yes, sir.

The Court: Are they marked?

Mr. Sprecher: Yes.

The Court: Can someone spare a copy for me?

Mr. Sprecher: I have got a copy.

The Court: All right. Hand this up.

Mr. Sprecher: No, Exhibit No. 8 is on top, your Honor.

The Court: What is that dated?

Mr. Sprecher: November 23, 1954.

The Court: What is No. 8? Here is No. 8, November 23, 7.

Mr. Sprecher: I would like to mention No. 8 first.

The Court: Is this your present No. 8?

Mr. Sprecher: Yes, our present.

The Court: For identification?

Mr. Sprecher: It has already been identified.

The Court: Yes. This is not the deposition though?

Mr. Sprecher: No, it is not. This is the contract between the parties. I think your Honor indicated that would be admitted.

634 Mr. Kohn: I have no objection.

Mr. Sprecher: I am offering that first.

The Court: All right, Defendant's Exhibit 8 is received in evidence.

(Said document so offered and received in evidence was marked DEFENDANT'S EXHIBIT NO. 8.)

Mr. Sprecher: This is a letter of transmittal. Also is a letter of transmittal.

The Court: What is the number?

Mr. Sprecher: This is part of the—this will be stapled together.

The Court: The agreement?

Mr. Sprecher: That is attached to the letter.

The Court: This should go with that.

Mr. Sprecher: Yes.
The Court: Those are received.
Mr. Sprecher: Then also Defendant's Exhibit No. 13.
The Court: 13.
Mr. Sprecher: Which is this computation by Mr. Willis. It is the long sheet.
The Court: Yes.
Mr. Kohn: This we have not had a chance to study, but I think the Court pointed out—
The Court: I gave that to Counsel for the defen-
635 dant. Mr. Willis offered it in obedience to my subpoena and I think this is material.
Mr. Kohn: Sir?
The Court: I think this is material. Do you have any reason why it should not go in?
Mr. Kohn: This is only Reno shipments?
Mr. Sprecher: That is all.
Mr. Kohn: No objection.
The Court: It may be received.
(Said document so offered and received in evidence was marked DEFENDANT'S EXHIBIT 13.)
The Court: Well, we will shorten that up.
Mr. Sprecher: We are withdrawing. We don't have these for the record. This is No. 14 and 15. I am sorry. I withdraw my statement. The numbers that we are withdrawing are Nos. 22, 23, 26, 27, 28, 29, 30, 32 and 33. Then on the others—
The Court: Very well.
Mr. Sprecher: I would like to make a brief argument, your Honor.
The Court: First offer them.
Mr. Sprecher: All right. I will offer those, Nos. 7—
The Court: No. 7. Any objection to No. 7? That is this letter of March 2, 1954.
636 Mr. Sprecher: There is a draft of a contract attached to it.
Mr. Kohn: We object to all preliminary drafts because they are merged into the final contract.
The Court: Yes. I have previously indicated my feeling on that.
Mr. Sprecher: I wanted to make my argument.
The Court: Certainly. I will hear you.
Mr. Sprecher: Your Honor, this draft of contract is dated March 2nd. The covering letter is dated March 2, 1954, which is several months after the controversy in this case.

The Court: Yes.

Mr. Kohn: If the Court please, there is a question about whether or not these documents are going to be admitted. We are near the noon hour. I suggest that we argue this out of the presence of the Jury.

The Court: It won't make any difference to me. It would probably be better to give you a little longer lunch hour. I have to stay and work. You go to lunch until two o'clock.

(Whereupon the Jury retired from the Court room and the following proceedings were had out of the hearing and presence of the Jury:)

637 (Whereupon the following proceedings were had in open court out of the presence and hearing of the jury:)

The Court: Now, the one you are now talking about is undated, is it?

Mr. Sprecher: Yes.

The Court: That should go with the letter—Exhibit 7?

Mr. Sprecher: That is right, your Honor.

The Court: Well, I had the wrong one with Exhibit 8. The one that should go with Exhibit 8, and which we have received in evidence, is dated October 5, the contract. These are loose here and I put the wrong one with the wrong letter.

Now, we are talking about the letter of March 2, and an undated contract, having only the year 1953 on it, is that right?

Mr. Sprecher: That is correct.

The Court: Now, where were you?

Mr. Sprecher: The covering letter is dated March 2, 1954, which was about five months after the present controversy arose. The covering letter contains this provision in the 3rd paragraph by Mr. Willis:

(Reading) "I believe the contract contains all of the pertinent points, and I have endeavored to embody in
638 the contract, a clear outline of "the relationship between Crest and E. A. S. A."

I read from the draft that Mr. Willis had prepared just two paragraphs from that. Paragraph 1 states that: "Shipper is a Mexican corporation owned by the following firms—"

"Shipper" is previously stated to be Exportadores Associados or E. A.

(Reading) "Shipper is a Mexican corporation owned

by the following firms Congeladora del Pacifico, Hernando de Cimo • • •

"The above list of firms are owners of refrigerator plants and refrigerated warehouses and/or fishing vessels and/or are engaged in fishing for and otherwise acquiring shrimp, preparing same for sale in a frozen condition, and desire to export their entire production of frozen shrimp, excepting the portion thereof required to be reserved under Mexican law for national consumption through the firm of the Exportadores Associados, S. A., de C. V."

Now, I go down to paragraph 12, your Honor, which reads:

(Reading) "The parties agree that the foregoing is a full, true, and complete translation into the English
639 language of the material "provisions of an agreement of the Spanish language which was executed by the parties in the City of Mexico, Federal District, Mexico," And the date is blank.

Now, this is what Mr. Willis thought he had agreed to in the Spanish language sometime and he drafted this. It states that Refrigeradora del Noroeste is going to sell all of its consumption to Exportadores Associados, and he says that this is a translation of what "we previously had agreed to in the Spanish language."

Just before I conclude, going to the contract as it originally was executed, this paragraph 12 has been changed somewhat in the executed agreement to read as follows:

(Reading) "The parties agree that the foregoing are full, true, and complete material provisions coinciding with the discussions conducted on the matter in the City of Mexico Federal District of Mexico, duly authorized by the Board of Directors of Exportadores Associados in accordance with the minutes of the meeting of July 10, 1953."

Now, we are not introducing this preliminary draft to establish the relations between Crest and E. A. We are doing it merely to show Mr. Willis as late as March, 1954, thought he had entered into a contract that had been
640 put into the Spanish language which included obtaining all the shrimp of Reno.

For that reason we think it is very material, regardless of the fact that the parties later were able to change the contract a little, not so as to make it contrary, but merely to leave out that provision about Reno being involved. I think it is material because it is not intended to show the

relations between Crest and E. A., but merely to apply to the issues that are presented here.

The Court: It may well be because that provision is incorrect, that is why the contract was not executed.

If I let it in, I open the door to all sorts of collateral testimony as to why the contract, the draft of which you now seek to introduce, was not executed. I permitted you to have Mr. Willis on the stand for cross examination. You went fully into all of these transactions. I required him fully to disclose all of his papers to you. I permitted you as your witness to cross examine him. I think you have fully covered the question.

For me now to permit an unexecuted contract discussed in preliminary negotiations which finally resulted in an executed contract which I have received in evidence to go in, would unduly prolong this trial. I would then open the door to all sorts of explanations as to why that
641 was discussed, why it was in one draft, and why it did not find its way into the final draft, and it will unnecessarily protract the trial and only result in confusing the jury.

The objection is sustained.

Mr. Sprecher: The next document is No. 9.

Mr. Kohn: If the Court please, exactly at that point I am not sure I made the formal objection as previously. I will reiterate the previously stated objection.

The Court: Yes.

Mr. Sprecher: No. 9, your Honor, is a letter signed by Mr. Willis.

The Court: Yes. I believe it is March 23, 1953. It is typed up into the printing there.

Mr. Sprecher: That is right, it is March 23, 1953.

The Court: I saw it. It is to Mr. Isaac Coppel.

Mr. Sprecher: That is a letter—

The Court: Is there any objection to that?

Mr. Kohn: I have trouble reading it, if the Court please.

The Court: Do you want to read this copy? This is quite clear.

Mr. Kohn: Wait a minute, I think I have a different light on it now.

What is this dated?

642 Mr. Sprecher: March 23, 1953.

Mr. Kohn: I object to that for the reasons previously stated, namely, that these are preliminary negotia-

tions that have been merged into the contract. Secondly, the writer of the contract is not an agent of the Plaintiff and can in no way bind it. It is merely cumulative of the previous testimony in evidence in the case. For those reasons, I object.

The Court: Do you want to say something about this?

Mr. Sprecher: Only that it does throw additional light on the formation of this Crest Importing Company, and the parties that were involved in it, and Mr. Willis there states that the operation will not be feasible unless six million pounds of shrimp per year are covered in the Crest operation.

The Court: Well, again, we had Mr. Willis on the stand and I don't think that this throws any additional light on it. The objection is sustained.

Mr. Sprecher: No. 10 is a letter dated May 5, 1953, written by Willis,—

The Court: Just one minute, now. All right.

Mr. Sprecher: —in which Mr. Willis sets out the production figures for various Companies and could become involved in the operation.

The Court: This was preliminary now to the contract.

643 Mr. Kohn: I make the same objection.

The Court: The same ruling.

Mr. Sprecher: No. 11, in view of your Honor's rulings, I will withdraw No. 11.

The Court: No. 11 is withdrawn.

Mr. Sprecher: There is a group of five, your Honor, I think we can handle as a group: 14, 15, 16, 17 and 18.

The Court: Very well.

Mr. Sprecher: These are all letters showing the transmittal of drafts of contracts back and forth preliminary to the final contract.

The Court: To the final execution?

Mr. Sprecher: In line with my theory regarding the preliminary drafts of a contract, I should like to have these admitted.

Mr. Kohn: I make the same objection.

The Court: The same objection and the same ruling as on the preliminary draft. They will not be received.

Mr. Sprecher: No. 19 is a letter dated September 17.

The Court: Subsequent to the draft or prior to it?

Mr. Sprecher: Now we are on another phase of it.

The Court: This contract was in October 5?

Mr. Sprecher: That is right.

The Court: All right, this is September 17. What is this?

644 Mr. Sprecher: This is very short, I can just read it.

The Court: I see it here.

Mr. Sprecher: It indicates that the entire stock in Crest was purchased by E. A.

The Court: Well, that has been admitted. This would be cumulative of it. I cannot see any objection to it.

Mr. Kohn: It is a letter from an attorney to Mr. Fraustro.

The Court: Willis already said this on the stand anyway. There is nothing here. It is nothing but cumulative. I think you would be cluttering the record up, but if you want it in I see no reason why it should not go in.

Mr. Sprecher: I ask it go in.

The Court: You want it in?

Mr. Sprecher: Yes.

The Court: It will be received.

Mr. Kohn: It is a letter from a lawyer representing Mr. Willis.

The Court: It is probably hearsay, but a carbon copy has been sent to Mr. Willis and he testified to this already. I don't see that it does any harm or any good.

Mr. Sprecher: Perhaps we can handle 20 and 24 together, your Honor.

The Court: 20 and 24, very well.

Mr. Sprecher: One is July 17, and the other is June
645 25. Together with something that, one thing I took out of the salary folder of Mr. Willis, these three exhibits went directly together, your Honor. All three show that the Nacional Financiera—

The Court: You better mark the letter as an exhibit so it will have a number for identification.

Mr. Sprecher: Will you please mark this Defendant's Exhibit 88 for identification?

(Document so marked.)

It is marked 88. The three together show that Mr. Willis' salary—

The Court: Whose attorney is Donnelley?

Mr. Kohn: Willis'.

Mr. Sprecher: Nacional Financiera guaranteed his salary for two and one-half years.

The Court: He said that. Did not he say that on the

stand? He was asked if his salary was guaranteed by Nacional Financiera and he said it was.

Mr. Sprecher: He started to explain it. His explanation is here.

Mr. Kohn: There were debentures put up.

The Court: As I recall his answer it was that it was guaranteed. He went into a long dissertation on it.

Mr. Kohn: Not in the common sense of the word.

The Court: Maybe the jury may have taken a different interpretation than I did but I thought he said it was
646 guaranteed.

Mr. Kohn: There were debentures put up as security by E. A.

The Court: That is right. That is what he said. And then he was asked whether E. A., was financed by Nacional Financiera, and he said it was.

Mr. Sprecher: So that these documents we have mentioned will show that Nacional Financiera guaranteed the guarantee of E. A.

Mr. Kohn: If the Court please, are you through on that?

Mr. Sprecher: Yes.

Mr. Kohn: I can't see the materiality or relevance of how Mr. Willis' salary was paid or has any part in this dispute between totally independent persons as strangers to the transaction. I don't know what it proves. It is just cluttering up the record. We are not bound by it.

Mr. Sprecher: It proves this, your Honor—

The Court: I think there is sufficient reason for putting it in in light of Mr. Willis' testimony.

What is the number you gave to the guarantee?

Mr. Sprecher: No. 88. If that goes in I will withdraw the other two that relate to it.

The Court: You withdraw 20 and 24?

Mr. Sprecher: That is right.

The Court: EXHIBIT 88 will be received in evi-
647 dence. Re-offer all of these when the jury is in the box. I receive them subject to their being re-offered when the jury is in the box.

What is the next of these?

Mr. Sprecher: I will make this very short. This is not an executed copy.

The Court: It was taken from his files and he testified that these were authentic.

Mr. Sprecher: I can withdraw all the rest of my exhibits if this is agreed it was executed.

The Court: You won't raise any point about its not being executed, will you?

Mr. Kohn: If I find out it was executed, I will stipulate. Will you give me a moment?

The Court: Surely.

Mr. Kohn: If there is anyone here that knows; they may not know.

The Court: If not, you can introduce it as a document that was delivered, counsel, in obedience to a subpoena duces tecum, his files—

Mr. Sprecher: I think that I can then introduce 24 which says that it has been executed, and get it in that way. That is the only way.

The Court: Yes. Exhibit 24 says that it has been
648 executed, so if you can stipulate to it, we will receive—

Mr. Sprecher: It is in Exhibit 20.

The Court: I will receive Exhibit 20 then, if you cannot stipulate.

Let him find out over the noon hour.

What else is there?

Mr. Sprecher: That is all.

The Court: These others you are withdrawing?

Mr. Sprecher: Yes.

The Court: 21, 25, 31 are being withdrawn?

Mr. Sprecher: That is right.

The Court: You reoffer those in the hearing of the jury.

Can you stipulate?

Mr. Kohn: Yes.

The Court: Then we won't need Exhibit 20.

Very well. We will recess now.

First of all we offer them this afternoon when the jury is here.

How many more witnesses are there for the defense?

Mr. Sprecher: We are through.

The Court: The defense will then rest?

Mr. Sprecher: Yes.

The Court: Do you want to be heard on your motion to strike?

649 Mr. Kohn: That is right, and then we will have two witnesses in rebuttal yet.

The Court: About how long will they take, do you think? The rest of the afternoon?

Mr. Kohn: I would say by the time we argue the motion and everything, just about.

The Court: It might take up a good deal of the afternoon.

We will recess until 2 o'clock.

(Whereupon a recess was taken in the above-entitled cause until Monday afternoon at 2 o'clock, on June 13, 1955.)

650 Before Judge Campbell, and a Jury.

Monday, June 13, 1955,
2 o'clock p. m.

Court reconvened pursuant to recess.

Present:

Mr. Louis A. Kohn and Mr. Patrick O'Brien, appeared on behalf of plaintiff;

Mr. Robert A. Sprecher and Mr. Joseph Clayton, appeared on behalf of defendant.

651 (The following proceedings were had in the court room in the hearing and presence of the Jury:)

The Court: The defendant may proceed.

Mr. Sprecher: Your Honor, at this time we would like to introduce in evidence Defendant's Exhibits Nos. 8, 13, 19 and 88. Those are the ones that we discussed.

The Court: After the Jury left this morning?

Mr. Sprecher: Yes.

The Court: Very well, they may be received over the objection of counsel, which may be noted and is overruled.

Mr. Kohn: Except on 13 there was no objection.

The Court: On 13 there was none. Very well.

(Said documents so offered and received in evidence were marked DEFENDANT'S EXHIBITS Nos. 8, 13, 19 and 88.)

The Court: Further evidence?

Mr. Sprecher: I will read these first.

The Court: Do you want to read the exhibits?

Mr. Sprecher: Yes.

The Court: Very well, do so.

Mr. Sprecher: Defendant's Exhibit No. 8 consists of

a contract dated October 5, 1953, and a covering letter which is dated November 23, 1954. The covering letter
652 is addressed to Crest Importing Company, Inc., San Diego, California. It reads:

"As per the instructions which we received from Exportadores Asociados, S.A. de C. V., enclosed herewith we are sending you (3) copies of the contract between Easa and Crest, that has been written in English. Please sign each one of the copies and return these directly to Exportadores Asociados.

"We thank you for your kind attention to this matter, and remain,

"Yours very truly,
"Congeladora Del Pacifico, S.A."

The contract itself reads as follows, and I will not read it all, but if counsel asks me to read portions which I omit, I will do so.

"Agreement for Sale of Shrimp Between Exportadores Asociadoes, S.A. de C. V. and Crest Importing Company, Inc.

"In the City of Mexico, Federal District, Mexico, on the 5th day of October, 1953, Exportadores Asociados, S.A. de C. V., hereinafter called 'Shipper', and Crest Importing Company, Inc., a California corporation, hereinafter called 'Crest', entered into the following agreement:

653 "1. Shipper is a Mexican corporation incorporated in accordance with the legal requirements of the Republic of Mexico.

"2. Crest is engaged in distributing in the United States of America and elsewhere frozen seafoods and other commodities and has facilities for making such distribution at market prices.

"3. Shipper agrees to sell to Crest, and Crest agrees to buy from Shipper on the terms hereinafter stated, Shipper's entire production of frozen shrimp for a period beginning from the date of execution of this agreement and ending August 31, 1956."

Then skipping to paragraph 12:

"12. The parties agree that the foregoing are full, true and complete material provisions coinciding with the discussions conducted on the matter in the City of Mexico, Federal District, Mexico, duly authorized by the Board of

Directors of Exportadores Asociados, S.A. de C. V. in accordance with the minutes of the meeting of July 10, 1953, authorizing the celebration of such agreement, and that in the event of disagreement as to the meaning, effect, or interpretation of said agreement, the foregoing English text shall control.

654 Executed in Triplicate.

"Exportadores Asociadoes, S.A. de C. V.,
"By (Signed)
"Crest Importing Company, Inc.,
"By (Signed)."

655 Mr. Sprecher: Exhibit 13, we will just point out the part that it shows the sums of frozen shrimp received by Crest Importing Company from Exportadores Asociadoes, and originating from Reno during the period beginning June, 1953, through August, 1954, and it shows that the total number of pounds received from Reno by Crest is 1,574,780 pounds of shrimp.

Mr. Kohn: Mr. Sprecher, if the Court please, I would like to ask Mr. Sprecher to read these dates in the 4th column.

The Court: Do you agree to that? Do you want to read those?

Mr. Sprecher: Yes, I will read those.

The Court: All right.

Mr. Sprecher: This exhibit shows that the first carload, it says the date is October 23, 1953, in the amount of 44,000 pounds.

Defendant's Exhibit 19 reads as follows, and it is addressed to Oscar Fraustro, C.P.T., Nacional Financiera, Mexico:

(Reading.) "Dear Sr. Fraustro:

"Pursuant to the understanding made in my office when you were in San Diego, I am enclosing stock certificate No. 1 of the Crest Importing Company, Inc., in the
656 amount of 650 shares at par value of $100.00 issued to Exportadores Associados, S.A. de C. V.

"With best personal wishes,

"J. A. Donnelley."

Finally, Defendant's Exhibit 88 is entitled "guarantee" and it reads as follows:—incidentally, this copy has some blank spaces on it, but counsel stipulated that this guarantee was executed by the parties who are mentioned in the agreement.

(Reading.) "Exportadores Asociados, S.A., pursuant to authority granted by its Board of Directors according to the laws of the Republic of Mexico in such cases applying, as the sole stockholder of Crest Importing Company, Inc., a California, United States of America, corporation, does hereby approve and ratify the employment contract dated the ..... day of ....., 1953, between the said Crest Importing Company, Inc., a corporation, and J. W. Willis, a copy of which is attached hereto and by this reference made a part hereof, and as consideration to the said J. W. Willis for inducing him to leave his prior employment and become General Manager of the said Crest Importing Company, Inc., a corporation, and because
657 of financial benefits which Exportadores Asociados, S.A., expects to realize because of the employment of the said J. W. Willis, does hereby unconditionally and irrevocably guarantee the payment of the salary to the said J. W. Willis, provided in said Contract of Employment, for a period of two (2) years and six (6) months, provided the said J. W. Willis shall faithfully perform the conditions and provisions on this part agreed in said Contract of Employment, and further agreeing with the said J. W. Willis that if for any reason whatsoever, other than the failure of the said J. W. Willis to comply with the provisions on his part agreed in said agreement, for any period of the first two (2) years and six (6) months of the term of his employment, upon demand, Exportadores Asociados, S.A. will forthwith pay said salary to J. W. Willis on behalf of the said Crest Importing Company, Inc., a corporation.

In Witness Whereof, Exportadores Asociados, has set its hand and seal at ..... Republic of Mexico this ..... day of ....., 1953.

Exportadores Asociados, S.A.,
By .....
President."

658 And then:

(Reading.) "Nacional Financiera, S.A. does hereby acknowledge that it has read the foregoing Guarantee on the part of Exportadores Asociados, S.A. and does further acknowledge that Exportadores Asociados, S.A. has deposited with us certificates of participation in the total amount of $..... for the purpose of guaranteeing the payment of the agreed salary to J. W. Willis

by Crest Importing Company, Inc., a California corporation, United States of America, and further that the money represented by the said certificates of participation will not be used for any purpose whatsoever other than for the payment to J. W. Willis, as provided in the Contract of Employment, a copy of which is attached hereto, and further that upon the failure of either Crest Importing Company, Inc., a corporation, or Exportadores Asociados, S.A. to make any payment of salary when due to the said J. W. Willis, we, upon his demand, will pay the same out of the said funds deposited with us for this purpose.

Nacional Financiera, S.A."

659 Your Honor, I would also like to again offer in evidence these exhibits which we also discussed, but your Honor already denied. They are Defendant's Exhibits 7, 9, 10, 14, 15, 16, 17, and 18. Those were offered.

The Court: To the introduction of those, do you object?

Mr. Kohn: We object.

The Court: In accordance with the ruling heretofore expressed, the objection is sustained, and the exhibits will not be received.

Mr. Sprecher: We rest, your Honor.

The Court: Defendant rests.

Whereupon the Defendant Rested Its Case.

Mr. Kohn: If the Court please, the Plaintiff wishes to renew its motion to strike out certain evidence relating to the breading of shrimp transaction; in particular—

The Court: Do you want to strike certain portions of the counter-claim?

Mr. Kohn: Yes, in particular—

The Court: That should be heard outside the presence of a jury.

The jury will step into their chamber for a few moments. About how long will it take you?

660 Mr. Kohn: I don't think it will take any more than ten minutes, that part of it.

The Court: All right.

Mr. Kohn: I find that attorneys are sometimes not good judges of how long anything will take.

The Court: I have had experience with them.

(Whereupon the following proceedings were had in open court out of the hearing and presence of a jury:)

Mr. Kohn: If the Court please, you will recall on the Plaintiff's main case, there were a number of documents offered in evidence which your Honor accepted provisionally; among these were—

The Court: Are you making a motion to strike that portion of the counter-claim, and then you can argue both of the motions together.

Mr. Kohn: This is merely a motion to strike the evidence, not a motion for a directed—

The Court: If those portions of the counter-claim are stricken, then the evidence in the record likewise will be stricken.

You made a motion while this matter was pending before me, which both of you briefed, which I denied without prejudice to your right to re-state it at the end of the Defendant's evidence.

661 Are you now going to make the same motion?

Mr. Kohn: Yes.

The Court: I want to keep your record as clear as possible, if you will let me.

Mr. Kohn: That is right.

The Court: Make your motion now, and then argue both motions together.

Mr. Kohn: All right, sir.

The Court: Go ahead.

Mr. Kohn: First of all, the counter-claim alleges an oral contract. It is apparent from the testimony that has been adduced that the counter-claimant, the Defendant, claims that that was an oral contract that was entered into on or about July, 1952, to run concurrently with the extension agreement which I think is Plaintiff's Exhibit 2, which means that that is a contract that would last for a period of two years. The termination date of that agreement, I believe, under the Defendant's theory is August of 1954.

So, we run right smack into the Illinois Statute of Frauds which we presume covers this case, there being no other laws.

The Court: Before you argue, make your motion. You now wish to renew your motion?

Mr. Kohn: Yes, I resume my motion which is to strike all of the evidence relating to the—

662 The Court: First you are to strike the counter-claim, then you are to trike all the evidence?

Mr. Kohn: That is right.

The Court: Keep your record clear.

Mr. Kohn: That is right. All right, sir. Thank you very much.

The Court: You have a motion now, so that the Clerk gets it, to strike the counter-claim relating to the oral contract on the breading of shrimp?

Mr. Kohn: That is right.

The Court: And you have another motion to strike all of the evidence submitted by the Defendant and counter-plaintiff in support of that counter-claim.

Mr. Kohn: That is right.

The Court: I stated it for you. Now argue it.

Mr. Kohn: Now, I have already indicated that this claimed contract is to last for a period of two years, and therefore runs smack into the provisions of the Illinois Statute of Frauds.

Now, in Illinois in an action at law the doctrine of part performance does not apply. That is my first proposition.

Secondly, in jurisdictions where the doctrine of part performance does apply, acts that are merely preliminary and incidental to the beginning of the contract are not
663 sufficient to take it out of the Statute of Frauds. We have several cases on that. I think the best case is a Michigan case, which I will call to your Honor's attention after I have outlined my points, and after we have considered the evidence.

My third point is that the evidence of the counter-plaintiff, that is, the Defendant's own evidence fails very much, it falls far short of proving an oral contract.

I want to call your Honor's attention to two letters dated as late as September, 1952, which is several months after the claimed date of the execution of the contract. Mr. Henry Appelbaum asked two questions, which I submit have not been admitted in evidence as yet, they would be part of our rebuttal evidence if necessary, but it clearly indicates that as late as September he did not think he had any contract.

Furthermore, there is nothing in the record whatsoever to show there was ever a demand made on the part of the Defendant on the so-called Mexican Company to produce certain breaded shrimp. There is no query: where is the servicing you are supposed to render?

Furthermore, there is no evidence that this, no affirmative evidence that Mr. Saenz, who is merely a Director,

or Mr. Pinson were expressly authorized by the plain-
664 tiff Company to enter into such a long range contract.

Finally, it is that there is absolutely no showing of damage of any kind other than the expenditures of these preliminary sums which certainly are not elements of damage.

So, I think the Defendant has fallen short on all of the essential elements of a cause of action based upon this asserted claim; predominantly I have never seen a case so lacking in the essentials of the element of intention to contract. There is nothing in there that shows the parties—their intent in the contract.

I submit that our motions to strike, both motions to strike should be sustained.

The Court: Who will argue for the defense?

Mr. Kohn: I will say this one other thing, although it is a different point. It is purely an evidentiary point, but I submit it to the Court that it has some bearing on this, too. Many of the documents, and they have to be considered separately, were from third parties, not binding on the plaintiff in any manner whatsoever, but you need not consider that evidence until you rule on these other points.

Mr. Clayton: May it please your Honor; with respect to the motion of the plaintiff to strike the counter-
665 claims—

The Court: Just one counter-claim.

Mr. Clayton: Yes, sir.

Mr. Kohn: The part relating to the breading.

The Court: The oral contract relating to breading. There are two counter-claims. There is no motion about the other.

Mr. Clayton: No, sir.

With respect to that motion, I would like to call your Honor's attention to the allegation in the complaint in which we set out in our counter-claim with respect to the breaded shrimp, and that briefly is that on or about the 22nd of July, 1952, there was an oral contract entered into between the plaintiff and the defendant whereby the plaintiff agreed to perform the services of breading approximately one million pounds of small shrimp to be caught by the plaintiff during the year, and that the plaintiff was to get for that service over and above his cost 4 cents per pound, and that the defendant was to supply said articles which are set forth in this counter-claim.

It further alleges that we did in accordance with that provision send a carload of breading, labels, cartons, a deveining machine, at a cost of approximately $9,000.00 and that the plaintiffs agreed to supply at least a mil-
666 lion pounds during the year, and the profit from that would amount to $100,000.00.

It is counsel's contention that the defendant has not established by competent evidence this oral contract.

I think to begin with, your Honor, that first we have to bear in mind that a contract does not have to be spelled out and put in typewritten form. If there is an agreement between the parties as to first, of what one party agrees to do, and what the other party is to do in response thereto, and the compensation that is to be received—if that is shown, that is all that we have to do.

What we have shown so far would show that there was an agreement or a meeting of the minds of the parties. Have we shown that?

We have the testimony and it is not contradicted so far that Mr. Appelbaum went to Mexico City in July of 1952, and that he had a conversation with Mr. Saenz, and also Mr. Pinson.

Your Honor recalls what the evidence discloses as to their respective positions, the two gentlemen here. At that time Mr. Saenz was the man who controlled the policy of Reno and who handled the entire operation of it except the actual physical shipment of shrimp, Mr. Pinson,
667 according to his own testimony, was the general manager at that time.

Now, at that meeting they have two gentlemen who wanted to find out from the defendant what could be done to increase the production during the off-season, so that factories would be in operation. I think your Honor should bear in mind that prior to that meeting in July the testimony is that they had had several meetings dating back to 1951. But, the 1952 in July was more or less the culmination of it. They had come upon the idea of breading shrimp. At that time it was agreed that the breading of shrimp would be done during the off season to keep the factory going.

It was agreed that the plaintiff was to render the services of breading the shrimp. And that for those services it was agreed that they would receive 4 cents over and above cost. That at that time Mr. Pinson was asked by the defendant the approximate amount of shrimp that

could be breaded during that year, and he said that he would insure or that he would bread one million pounds during the year.

Now, I think your Honor at this point we do have a meeting of the minds. We have the plaintiff's through their duly authorized representative, Mr. Saenz, and Mr. Pinson, having agreed that they would engage in the operation of breading shrimp. They are going to per-
668 form those services for the defendant. The defendant agrees to pay them their cost plus 4 cents per pound. So, the compensation that they are to receive is definite. The duration of the contract according to the defendant's testimony, and that is not contradicted, and not denied, is that it would be co-terminous with the agreement that had been entered into on July of 1952, the extension agreement which we referred to.

With respect to that, I think that the evidence is clear that not only did they agree and come to an understanding, they did not have to write it down, but pursuant to that agreement they entered upon the performance of the services.

Now, why do I say that?

669 Now, why do I say that? The testimony is clear, your Honor, that after that meeting in July, in carrying out the terms of that agreement, Mr. Pinson met Mr. Appelbaum down in Dallas, Texas, at which time they went through a plant to see how the services would be performed in the breading of shrimp. Mr. Pinson at that time told him, according to the testimony and that is not denied, that he had seen enough. "We will go on and start producing." So, Mr. Appelbaum and Mr. Pinson parted.

Now, what do we find subsequent to that time? Not any preliminary negotiations towards carrying out an agreement, but the actual performance. We find, your Honor, that the plaintiff actually entered upon the duty of breading shrimp for the defendant. And why didn't he say that? That is uncontradicted. When the defendant sent Ray Jensen the following year to inspect, and that is in the record, he communicates with the defendant and tells him that they have breaded 350 boxes. The second day they breaded 900 boxes and that assembly line is ready to continue putting it out.

Now, it isn't any preliminary negotiation toward entering into a contract. I think the evidence unmistakably discloses that they entered into a valid agreement which

was to run co-terminus with the extension agreement,
670 that there was actual performance. Now, I don't think that we have to do anything more, in addition to the things that the defendant was supposed to do. He did that. He sent the deveining machines. He sent the cartons. He sent the labels. And in addition to that carrying out the terms of their agreement after they had decided, your Honor, that they would render the services of breading the shrimp, the question came up as to how it would be financed. Reno's representative stated that we can't afford to finance. So it was Reno's representative that said to form a Mexican company for the purpose of financing this operation. And that was done. Exportadores and Importadores I think we formed. That is the name of it. Investment was made in it for the purpose only of financing the services which the plaintiff was rendering to the defendant of breading the shrimp.

So, I don't think, your Honor, that we have fallen short of introducing into this record here competent testimony which conclusively shows an agreement for the rendering of that service with actual performance, both on the part of the plaintiff and the defendant, towards carrying out the terms of that agreement.

Counsel then says that the agreement comes right within the statute of frauds. First I would like to call your Honor's attention to this as a contract, first, for the
671 rendering of services. And I don't think it is any contention but that the statute of frauds does not apply to contracts for service.

This is a contract wherein Reno enters into to render certain services for the defendant, and nothing else. And that is certainly not within the statute of frauds.

Secondly, he says, and it is admitted, that this agreement is to be co-terminus of the extension agreement and the extension agreement, counsel says, runs for two years, until 1954; and he says it is, therefore, squarely within the statute of frauds.

Assuming, for the purpose of argument, your Honor, that this was not a contract for services, which we contend that it is and, therefore, not within the statute of frauds; even if it were not a contract for services, the statute of frauds does not apply here, because, by the terms of the original agreement which has been introduced in evidence here, that entire contract between the plaintiff and the defendant is conditioned upon the laws of the Republic of

Mexico, and it says that even though you are supposed to supply us with ten per cent,—with ninety per cent of the output, ten per cent for the domestic services, this contract is made subject to the laws of Mexico and if the laws
672 at any time are changed so that they cannot export any shrimp these contracts fall. So we have a contract, your Honor, where the performance of which can be performed within a year; and, therefore, not within the statute.

And I think that in the brief that counsel, or memorandum that counsel submitted he gave your Honor a quotation from Williston on Contracts, 2 Williston on Contracts, Section 495, pages 1441 to 2:

"A promise which is not likely to be performed within a year and which in fact is not performed within a year is not within the statute if at the time the contract is made there is a possibility at law and in fact that full performance such as the parties intended may be completed before the expiration of a year."

So here, it isn't what this agreement and the extension agreement says as to the term that is to run, if there is a possibility of full performance and completion of the whole contract within a year, even though it is not performed within the year, is immaterial. And as I have just attempted to call your Honor's attention to the fact that by the laws of Mexico that this contract is made subject to, if at any time they said that Reno couldn't export any shrimp, the contract was terminated. If even
673 three months after that agreement was executed or the extension agreement executed, the laws of Mexico said they couldn't export any shrimp, the contract was terminated. It was fully performed within a year. This oral agreement being co-terminus with it, the services which Reno had contracted to render for the servicing of shrimp also had terminated.

So I say, your Honor, that on counsel's second contention that it comes within the statute of frauds certainly is not applicable and we respectfully submit that the motion of the defendant to strike the counterclaim with respect to the breading of shrimp be denied and his motion to exclude, or to strike the testimony that has been submitted in support of that should be also denied.

Mr. Kohn: If the Court please, by way of a short reply, I will go to Mr. Clayton's last point.

The testimony adduced by them does not incorporate all

of it, does not permit the Court to have all of the terms of October, 1950, incorporated as the basis of the oral contract, only the duration. They claim it is a two-year contract, and his construction by way of an endeavor to embody all of this contract is absolutely unjustified.

Now, going on with the statute of frauds point:
674 He is in error, I believe, if he intends to argue that personal service contracts are not covered by the statute of frauds. We have here in Illinois two decisions. *Peck* v. *McCormack Harvesting Machines Co.*, 94 Ill. App. 366.

The Court: 566?

Mr. Kohn: Yes, sir, involving an exclusive sales contract; also *Westgate* v. *City of Aurora*, 229 Ill. App. 284, involving an employment contract. Then we have a case that I think is very similar on a number of points, *Cassidy* v. *Kraft, etc. Corp.*, 280 N. W. 814.

The Court: What jurisdiction?

Mr. Kohn: Michigan, 1938, breach of an oral contract, by which defendant granted plaintiff exclusive sales territory.

In affirming a directed verdict for the defendant—

The Court: Let us have the Illinois case.

Mr. Kohn: —the Court pointed out that the acts done were merely preliminary.

Well, in Illinois, as I said before, and these cases that I have just cited indicate that the doctrine of part performance does not apply.

Well, there is a question here whether this is an Illi-
675 nois contract or a Mexican contract, but in the absence of any evidence on the point I believe your Honor cannot take judicial notice of Mexican law and the Illinois law would govern.

Now, without regard to any of the law on the statute of frauds, we maintain that on defendant's own testimony there is not even a scintilla of evidence, I would say, that there was an intention to sign or not to sign but to enter into a contract such as they indicated here. At most it was in a preliminary stage. They had certain ideas, but my goodness, with all of the correspondence that has gone back and forth it certainly would be obvious to the Jury, at least, and this may be a Jury argument, if they had intended to enter into a definite contract, they certainly had proclivities along the lines of writing letters manifesting their intentions by written documents. So that

I think that our motion is well-founded, and as I said before in many of these communications they are relying on are from third parties and not at all binding on the plaintiff, and for that additional reason the motion to strike the exhibits should be sustained.

The Court: Do you have something you want to add?

Mr. Clayton: No, your Honor.

The Court: I have carefully reviewed the authorities cited by both of you at the time this matter was briefed
676 in connection with the pleadings and I held then that in accordance with the law of this Circuit, which I think is well-founded, our Court of Appeals of this Circuit wants to have something in the record on which to base these things. I think the legal points should have been determined at that time; but with the view in mind that it is better to have the record of what proof is going to be elicited in support of the claim, I denied your motion to strike it at the time you first filed it without prejudice to your right to renew it after the defendant and counterclaimant introduced its evidence in support of its counterclaim.

I now have the evidence before me of the counterclaim and except what was heard this morning, which was nothing on this point, I reviewed over the weekend everything that had been heard up to Friday night on the point.

Addressing myself first now to whether or not there is any evidence in the record to support the counterclaim, that is, the issue that there is nothing to go to the Jury, looking at the evidence adduced by the defendant in its most favorable light, as indeed I should at this point, the evidence, in my opinion, falls far short of what is necessary in order to establish the counterclaim that they allege.

First of all, it is alleged and has only within
677 the last few minutes been argued by counsel for the defendant that this oral contract for the breading of shrimp came into being at the same time, July of 1952, as the extension of the original agreement.

It seems to me that if the parties had anything further to agree upon, they had no hesitancy in 1952, July, of writing down the extension of the original agreement, and if there was any further meeting of the minds of the breading of shrimp or anything else, both were represented by counsel, and both had carried on lengthy negotiations, and if they had arrived at any agreement, certainly they would

have written it down as they did the extension of their first agreement. So much for the facts.

Now, as to the law. I reviewed all of the authorities cited, as I told you, at the time that you originally filed your written motion. I have re-reviewed them over the weekend; without necessarily delaying you at this time, suffice it to say that I feel that the alleged contract as a matter of law, if such a contract were actually entered into, which I doubt, as a matter of fact, but if it were actually entered into, as a matter of law, it is my opinion, that it falls squarely within the statute of frauds and is unenforceable.

Accordingly, the plaintiff's motion to strike the coun-
678 ter-claim of the defendant based upon the oral contract for the breading of shrimp and the plaintiff's motion to strike all portions of the testimony and all exhibits pertaining to such breading operation are each and both granted and that portion of the defendant's counter-claim is accordingly stricken.

Mr. Kohn: If the Court please, the plaintiff is now ready to proceed with its first rebuttal.

The Court: How long will your rebuttal take?

Mr. Kohn: The plaintiff's part of the questions of these two or three witnesses,—I have to put Mr. Olson next because Mr. Sprecher would not stipulate to certain figures. I think it would take about, say, it will take about an hour and fifteen minutes.

The Court: Let us hear as much of it as we can this afternoon. The reason I ask, I think we might as well take the afternoon recess now. Don't you think? Then we won't have to interrupt the Jury.

Mr. Kohn: Yes.

The Court: Suppose we take a ten-minute recess at this time.

(Recess taken.)

679 (Whereupon the following proceedings were had in chambers out of the hearing and presence of the jury:)

The Court: Pursuant to the request of the plaintiffs, the defendant has produced for the examination of the Court the 1954 Income Tax Return, Form 1065, of the Penguin Frozen Foods, a partnership.

The defendant objects to the production of this document in evidence or to any stipulation arising therefrom.

The Court, having heard the arguments from counsel for both sides out of the presence of a jury and in chambers,

rules that the parties should stipulate from this return as to the ordinary net income of the partnership for the year 1954, which is shown on the Return to be $32,833.60. It is also stipulated that the Return further shows that three of the partners devoted 100 per cent of their time to the business without compensation other than their share in the partnership Returns, which share is as follows:

Henry Appelbaum, $11,377.81, Stewart M. Appelbaum, $8,877.81, Robert D. Appelbaum, $6,377.81; that is to say, a total compensation to partners devoting 100 per cent of their time to partnership business in the sum of $26,-
680 633.43, which deducted from the total net income of the partnership for the taxable year leaves $6,200.17 for distribution to partners not devoting any of their time to partnership business.

Is that a fair stipulation?

Mr. Sprecher: Yes, it is, your Honor.

The Court: Do you think so?

Mr. Kohn: It seems so to me.

The Court: I think with that stipulation, gentlemen, you don't need to introduce the Return in evidence.

Now, you will stipulate to that, will you, with my assurance that that is what this Income Tax Return shows?

Mr. Kohn: What I do not understand, if the Court please, is he is stipulating and yet you recite he is objecting.

The Court: He is objecting to my requiring him to stipulate.

Mr. Kohn: If he is objecting, I don't know how it is a stipulation.

The Court: He stipulates when I overruled his objection to giving any information. He objects to giving any information concerning the income of the partnership. I have overruled that.

Mr. Kohn: He stipulates to the figures?

The Court: He stipulates now to what it is, is that understood?

Mr. Kohn: Yes.

681 The Court: Is the record clear for both of you?

Mr. Kohn: I think so.

Mr. Sprecher: Yes.

Mr. Kohn: Before we return and read this to the jury, I would like to confer with my colleagues and see how they want to handle this. In other words, it is a fact in the record. The question as to, do we want to make use of

it with the jury; not being a taxman, I wonder if I could have five minutes?

The Court: If you would rather I repeat it to the jury much the same as I just read it into the record, I shall do so if you want.

Mr. Kohn: Might I check with my associate?

The Court: Go now, and come back and tell us.

Mr. Kohn: All right.

(Whereupon Mr. Kohn left the room and then returned.)

Mr. Kohn: That is satisfactory.

(Whereupon the following proceedings were had in open court in the presence and hearing of a jury.)

The Court: Bring in the jury.

(Whereupon the plaintiff to further maintain the issues on its part, introduced the following evidence in rebuttal to-wit:)

682 Mr. Kohn: The plaintiff now wishes to call Mr. Sidney Greene.

The Court: Incidentally, before you proceed with the rebuttal, the jury at this time is informed that the court as a matter of law, has stricken one of the two counter-claims filed by the defendant herein; that is to say, I have stricken as unfounded in law the counter-claim that the defendant filed that alleged an oral contract based on the breading of shrimp. That is no longer before you. The one remaining counter-claim is still before you: That is, whether or not the contract was breached, and if it was, how much the defendant was damaged by the breach of the original contract as extended.

You may proceed with your rebuttal.

SIDNEY GREENE, called as a witness by the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Kohn.

Q. Mr. Greene, you haven't testified before, have you?
A. No, sir.
Q. Will you state your name, please?
A. Sidney Greene.

683 The Court: Spell the last name again, please.

The Witness: G-r-e-e-n-e.

The Court: Thank you.

By Mr. Kohn:

Q. Where do you reside, Mr. Greene?
A. 6610 N. St. Louis in Lincolnwood.
The Court: What town?
The Witness: Lincolnwood.

By Mr. Kohn:

Q. Are you engaged in business?
A. No, sir. I am employed at the Penguin Frozen Foods.
Q. That is the firm operated by Mr. Henry Appelbaum, the defendant in this case?
A. Right.
Q. How long have you been so employed?
A. Since March 19, 1954.
Q. March 19, 1954; that would be in the midst of what is known as the 1953—1954 shrimp season, is that right?
A. Yes.
Q. Which begins in October the preceding year and goes on until June or July of the next year?
A. Well, I don't know what you mean by "shrimp season".
Q. Well, doesn't the shrimp season run from approximately October to June or July of the following year?
684 A. Are you speaking of the Mexican shrimp season or domestic?
Q. Mexican, I suppose would be the more accurate thing.
A. Mexican shrimp, I don't know.
Q. You don't know? Does the firm advertise under the name of Penguin Frozen Foods?
A. Yes, sir.
Q. As such, does it advertise in any publication?
A. I began advertising in September, 1954 in the Southern Fisherman magazine.
Q. What is that magazine?
A. It is a trade publication.
Q. Where is it published?
A. In New Orleans.
Q. Where is it distributed?
A. Mainly to the wholesale fish dealers, all over the country.
Q. Were you in charge of the advertising for Penguin subject to Mr. Appelbaum's direction?

A. As such.

Q. Were you ever interviewed by the Southern Fisherman?

A. Interviewed in what way?

Q. Well, make a statement in connection with your business?

685 A. Oh, sure.

Mr. Clayton: I object to that as immaterial, unless he can show the materiality.

Mr. Kohn: I am coming to it. Those are preliminary questions.

Mr. Clayton: O.K.

The Court: All right, the answer may stand.

By Mr. Kohn:

Q. Calling your attention to September, 1954, that issue of Southern Fisherman, do you recall that you had an ad in that publication?

A. We had a contract for a thirteen time rates.

Q. Were you interviewed in connection with an article in that publication?

A. Well, I don't know what you mean by "interview".

Q. I hand you a page—Do you recall an article entitled, "Right combination Pays For Penguin."

A. Yes.

Q. Do you remember talking to someone?

A. Yes.

Q. And furnishing copy?

A. Yes.

Q. I call your particular attention to page 93 of this magazine, just opposite a photograph of you and Mr.

686 Appelbaum, and ask you if you recall that article?

A. Yes, it is written by Jerry Smith of the Southern Fisherman.

Q. And you approved it?

A. Yes, I did.

Q. Do you recall what you stated to Mr. Smith at the time?

Mr. Clayton: I object to it.

Mr. Kohn: If the Court please, there are admissions in here directly contrary to the position taken by the defendant in this case today.

The Court: Mark them on the margin and hand them up.

Mr. Kohn: It is this quotation on page 93.

The Court: Hand it to the Marshal.

This man is the advertising manager, is he for the defendant?

Is there still in existence under the laws of Illinois, a law known as the business—

By Mr. Kohn:

Q. Are you sales manager also?

A. I am not advertising manager. We don't have such a man.

687 Q. But you are in charge of the advertising and furnishing copy?

A. As such. I mean, we all do.

The Court: What else do you do?

The Witness: I sell shrimp.

The Court: You do?

The Witness: Yes.

The Court: Do you buy any?

The Witness: Yes.

The Court: I am afraid you might let yourself in then. It is the one on page 93?

Mr. Kohn: 93, the right hand margin.

The Court: Oh, yes.

What else is there in this article?

Mr. Kohn: That is all that I want to offer.

The Court: I don't think that is competent evidence. I sustain the objection.

Mr. Kohn: I would like to make an offer.

The Court: I might publish an article saying that I am a good lawyer, and there are a lot of differences of opinion on that.

Mr. Kohn: I would like to make an offer of proof 688 which will consist of this excerpt. I don't want to take the time now.

The Court: Yes, you may write it out and then file the offer of proof.

Was that the purpose of this witness?

Mr. Kohn: That is all. I am through.

You may cross-examine.

The Court: You may step down.

Mr. Kohn: There may be cross-examination.

Mr. Clayton: No cross.

The Court: They don't want to cross-examine him unless they have gone crazy.

(Witness excused.)

Mr. Kohn: Mr. Henry Appelbaum.

HENRY APPELBAUM, recalled as a witness by the plaintiff, having been previously duly sworn, was examined and testified further as follows:

Direct Examination by Mr. Kohn.

Q. You are the same Henry Appelbaum who testified before, and you have been sworn in this case?
A. Yes.
Q. Is that correct?
689 A. Yes.
Q. Mr. Appelbaum, is Penguin Frozen Foods a partnership?
A. Yes, sir.
Q. When was it formed?
A. I believe—a partnership? In 1951.
Q. Who were the partners in 1951?
A. My two sons, my wife, my daughter, and myself.
Q. Who are the partners now?
A. The same.
Q. Isn't it true that there are certain trust funds that are partners?
A. Yes, there are trust funds for my children—
Mr. Clayton: I object to that, your Honor.
Mr. Kohn: I am entitled to show who the partners are.
The Court: Yes, he may answer in a general way.

By the Witness:

A. There are trust funds for my children and my wife.

By Mr. Kohn:

Q. Has Robert been a partner from 1950 to date?
A. Yes.
Q. And Stewart?
A. Yes.
Q. And yourself?
690 A. Yes.
Q. And now, what is Bob's percentage of the total partnership?
Mr. Clayton: I did not hear your question.
Mr. Kohn: What is Bob's percentage of the total partnership?
The Court: Is Robert the witness who was on the stand this morning?

Mr. Clayton: I object.
Mr. Kohn: Yes.
The Court: All right, he may answer.

By the Witness:

A. I think it is one-seventh.

By Mr. Kohn:

Q. One-seventh?
A. Either one-seventh or one-ninth, I don't remember.
Q. Is it the same today as it was when he first became a partner?
A. I think so.
Q. When was Prawns, Inc., formed?
A. I don't recall.
Mr. Clayton: I think this is purely repetitious.
Mr. Kohn: It is not. I am leading up to a very
691 important point that has not been brought out.
The Court: He already testified to the organization of Prawns and to this 51 per cent of the stock and all the rest of it.
Mr. Kohn: I want to bring additional points out that are material.
The Court: Bring out the additional ones, not the others.

By Mr. Kohn:

Q. Mr. Appelbaum, I ask you if you owned any stock in Prawns, Inc., is that correct, and you said no?
A. That is right.
Q. Have you at any time owned any stock in Prawns, Inc.?
A. No, never.
Q. Do you remember giving a deposition in May of 1954, in my office?
A. Yes.
Q. Do you recall that I asked you the following question at page 63:
(Reading.) "Q. Have you ever heard of a firm by the name of Prawns, Inc.?
"A. Yes."
692 Do you recall that question and that answer? That is correct, isn't it?
A. The answer is correct.
Q. The next question:

(Reading.) "Q. Do you have any connection with them?"
You answered:
(Reading.) "A. Yes, we own some stock in the Company."
Is that a correct answer?
A. It is not a correct answer because I don't own any stock.

Q. Then your question—you never owned any stock in the Company, is that correct?
A. Never.

Q. I asked you this question on the same occasion,
(Reading.) "Are you a substantial stockholder?"
You answered:
(Reading.) "Yes."
That is at the bottom of page 63 and the top of page 64.
A. If I answered it that way, I was wrong, because I never owned any stock.

Q. In other words, your answer to the Court and jury is that you at no time owned any stock?
693 A. At no time owned any stock.

Q. Were you ever a creditor of Prawns?
A. Yes, we advanced them some money to buy some shrimp for us.

Q. When you say "some money", how much money would you say?
A. I don't recall.

Q. Isn't it true—
Mr. Clayton: I object to that, if the Court please.
The Court: Well, he has answered. The answer may stand.

By Mr. Kohn:

Q. Isn't it true, Mr. Appelbaum, between September and November, 1953, Penguin Frozen Foods advanced approximately $209,000.00 to Prawns, Inc.?
Mr. Clayton: I object to that, if the Court please.
The Witness: It is not true.
The Court: The objection is overruled. The answer may stand.

By the Witness:

A. It is not true.

By Mr. Kohn:

694 Q. Prawns engaged in the business of importing West Coast Mexican shrimp and selling them in the United States?

A. Yes.

Mr. Clayton: What date?

By Mr. Kohn:

Q. From the time o its organization down to—

A. That I don't know.

Q. During the '53-'54 shrimp season, you are familiar with that term, aren't you?

A. '53-'54, yes.

Q. Was it engaged in the business of importing West Coast Mexican shrimp and selling them in the United States?

Mr. Clayton: I object to that. That is after this period.

The Court: I cannot hear you.

Mr. Clayton: That is after the termination of this agreement.

The Court: I permitted examination up to and including the end of 1954 and other matters, so I will here.

By Mr. Kohn:

Q. Let us begin in September, 1952 through July of 1954.

A. What was the question?

Mr. Kohn: Read the question again, please.

695 (Question read.)

By the Witness:

A. I think they were, but they started later than that.

By Mr. Kohn:

Q. Later than that. Do you know the extent of those purchases?

A. No, I don't.

Q. Well now, what was the purpose of this money being advanced by this partnership to Prawns?

Mr. Clayton: I object to that, if the Court please.

Mr. Kohn: If the Court please—

The Court: What is it you want to bring out?

Mr. Kohn: If the Court please, under the contract between Penguin, the defendant, and the plaintiff, there was a provision that the defendant would purchase its supply exclusively—

The Court: Show me the provision in the contract.
Mr. Kohn: It is paragraph—
Mr. Clayton: There is no allegation, if I remember the pleadings where they allege there was any breach on the part of the defendant by purchasing from anyone.
696 The Court: Well, they can always amend their pleadings up to the time the jury retires.
Mr. Kohn: I hand the Court the contract and the supplement which I think is easier to find it in, near the bottom of the extension agreement.
The Court: The renewal of the extension contract?
Mr. Kohn: Yes.
The Court: About what year are you asking him, now?
Mr. Kohn: September to November, 1953.
The Court: 1953.
The objection is overruled, and he may answer.

By the Witness:

A. We never bought any West Coast shrimp from September to October, 1953, from anybody.

By Mr. Kohn:

Q. When you say "we" do you mean Prawns?
A. Penguin.
Q. My question related to Prawns.
A. I don't know what Prawns did.
Q. I hand you a memorandum of shipments marked for identification as Plaintiff's Exhibit 31, and ask you if
697 that would refresh your recollection?
Mr. Kohn: I have no copy of it.
Mr. Clayton: Your Honor, if I understand the question correctly, he is asking him what Prawns purchased. We would not be bound by anything that Prawns did.
The Court: I am surprised that you did not object when he asked the question.
Are you now objecting?
Mr. Clayton: Yes, sir.
The Court: Your objection is sustained.
Mr. Kohn: If the Court please, one of the partners is a 51 per cent owner.
The Court: The jury understands that.

By Mr. Kohn:

Q. Do you know how much West Coast shrimp Penguin bought from Prawns during the period beginning September, 1953, down to and including July, 1954?

A. That Prawns bought?

Q. No, that your Company bought.

A. We never bought anything from them until November.

Q. I see. Will you tell us during that period—

A. You are talking about September?

Q. I said beginning in September. That includes
698 the period from September until the end of the season in the next summer.

A. I think we bought about ten or twelve, maybe fourteen carloads of shrimp from them.

Q. Mr. Appelbaum, are you familiar with the fact there was a market break in the price of shrimp early in the year 1954?

A. 1954?

Q. Yes.

A. Yes.

Q. Do you know the extent of that break?

A. Well, it came later than that. It came in March and April, I think.

Q. Do you recall about what the break was?

Mr. Clayton: I object to that.

Mr. Kohn: That has a bearing on damages, if the Court please.

The Court: He may answer.

By the Witness:

A. I don't recall right now, but there always is a break in the market at that time of the year.

By Mr. Kohn:

Q. Was this an unusual break, or just something
699 that occurred every season?

A. Well, every season that is generally, in April, around April and May, as a rule there is a poor supply of shrimp usually and the market goes down; and it picks up again in July.

Q. Were you then in the market on your own account?

A. Yes, sir.

Q. Maybe it would refresh your recollection towards giving us the exact amount of that break then, if I would call your attention to page No. 71 of the deposition you gave in my office in May, 1954. You see, I asked you:

"How big was the break?"

Do you see the answer? It is on page 71.

Mr. Clayton: Your Honor, I might just make this observation in bearing out an objection to this. If I understand, he is asking him about a break in the market in 1954. If I understand it, the communications between the plaintiff and the defendant was to the effect that plaintiff stated back in October they were not sending him any other shrimp.

The Court: Now, the witness for the defendant this morning got on the stand and was computing how much he lost by reason of that, and as one of the items of his 700 computations, it was what was the prices of shrimp, and he said he did not think there was any substantial break in the market affecting these prices. He said he got his prices from the Department of Wild Life and Fishery. This goes to the item of damages, so the objection is overruled. That is the item of your damages.

Mr. Clayton: Yes, sir.

By Mr. Kohn:

Q. Do you recall now after reading that what the break amounted to, and when it occurred?

A. This is a difference of prices in November and December and May, which is five or six months, and it was not a big break in the market in five or six months.

Q. Will you state what that is without giving your conclusion?

A. About 15 cents a pound, from 90 to 75.

Q. When did that occur?

A. I don't remember now.

Q. Can you remember after reading your testimony?

A. No, I don't.

Q. All right, Mr. Appelbaum. I will take that back.

Mr. Appelbaum, I hand you Plaintiff's Exhibit 701 marked for identification 28 for identification that has already been admitted, except that we are going to get it in evidence now.

This is a letter from you to plaintiff dated May 25, 1953.

The other day you said, I believe, that you had sent that letter, is that correct?

702 A. I remember this.

Mr. Kohn: I now offer Plaintiff's Exhibit 28 in evidence. Is there any objection?

Mr. Clayton: It looks like it is 29.

Mr. Kohn: It is the same letter referred to last week.

I couldn't introduce it in evidence because it was your case. It was on cross-examination. So the Court said I should save it for rebuttal. Is there any objection?

Mr. Clayton: No.

The Court: It may be received.

(Said document, so offered and received in evidence, was marked PLAINTIFF'S EXHIBIT NO. 28.)

By Mr. Kohn:

Q. Now, Mr. Appelbaum, I hand you a letter dated January 20, 1953, on the letterhead of your firm and ask if you recognize it, sent to Mr. Pinson, and addressed by, signed by your son.

Do you recognize that as being his signature?

A. I think it is.

Mr. Kohn: Yes. Will you mark this as Plaintiff's Exhibit 29 for identification?

(Said document was marked as requested.)

703 Mr. Kohn: No objection, I understand?

The Court: It may be received.

(Said document, so offered and received in evidence, was marked PLAINTIFF'S EXHIBIT NO. 29.)

By Mr. Kohn:

Q. Would you read this, Mr. O'Brien, will you read this letter?

Mr. O'Brien: (Reading):

Plaintiff's Exhibit 29 is addressed to Senior Pedro Pinson, care of Refrigeradora del Noroeste S.A., Mazatlan, Sinaloa, Mexico.

"Dear Pedro:

"On this date I sent a check to the Nacional Financiera for $2,149.38 covering the December, 1952 report. I'm sorry I deducted the breading before, but as you can see, Dad has straightened me out.

"On the freight charge for December, we accrued approximately $1700 on November 31st for unpaid freight bills and then charged you in error for them in December when they were paid. We now show a credit for you for this amount and we will reflect same on this months 704 report.

"I'm looking forward to getting down to Mazatlan and to learning the shrimp business first hand from you. All I have to do is talk dad into it.

"Best regards.

"Sincerely,
"Penguin Frozen Foods,
"/s/ Bob,
"Robert D. Appelbaum.

"P.S. We have paid thru car #13 to the bank."

By Mr. Kohn:

Q. Mr. Appelbaum, would you tell the Court and jury the total volume of shrimp handled by your firm during the 1953-1954 shrimp season? Begin, say, the 1st of October of 1953, right down through the end of July, '54.

A. I can't without looking up some figures.

Q. Would you say it was more or less than a million and a half pounds of—make it 500,000 pounds of shrimp?

A. I couldn't say without looking at some figuring out the—

Q. Would you say it was a million?

A. Yes, I would say it was a million.

Q. Would you say it was two million?

A. I couldn't say.

Q. Was there any particular document that you would like to refer to refresh your recollection?

A. I do not believe it shows the pounds on any of our documents. If there is I have not seen it.

Q. How about dollar volume? Do you know the dollar volume?

A. The statement would reflect it.

Q. Do you know whether or not it was a million?

A. It is not broken up that way. You have got sales of fish there too.

Q. You couldn't hazard a guess?

A. No.

Q. Would it be a million dollars?

Mr. Clayton: I object. He said he couldn't hazard a guess, your Honor.

The Court: Sustained.

By Mr. Kohn:

Q. I hand you what appears to be a financial statement of your firm dated August 31, 1954, consisting of several

pages marked for identification as Plaintiff's Exhibit 31, and ask you if that would help you in any way.

A. Yes, that would help me.

706 Q. Would you tell us then what the volume in dollars and volume in pounds, if you can?

A. In pounds they have not got it. In dollars it was a million and a half dollars in 1954 as against a million, $1,146,000 in '53.

Q. For the comparable season in '53?

A. This is comparable.

Q. Is this the calendar year or the months from October through July?

A. This is for eight months.

Q. State it, eight months.

A. Eight months prior to August 31st—no, eight months—yes, August 31, 1954.

Q. That is in dollars only?

A. That is right.

Q. You can't tell what it is in pounds?

A. No. This is fish and shrimp and lobster tails and everything else.

Q. It is not limited to shrimp then?

A. No.

Mr. Kohn: You may cross examine. I called him as an adverse witness.

The Court: He may cross-examine.

707 *Cross-Examination by Mr. Clayton.*

Q. Mr. Appelbaum, with respect to Prawns that counsel asked you about and asked you about certain depositions that were taken, now I understand you correctly, did I not to say that you were not a stockholder in Prawns?

A. Never.

Q. And he read from pages 63 and 64 of the deposition that was taken in his office in which there is contained a statement that you were a stockholder, according to what he read, is that correct?

A. That is right.

Q. You say that you are not?

A. No.

Q. I will ask you whether or not during the same deposition, reading from page 2, beginning at 260, at which you were being questioned again during that same session about whether or not you were a stockholder, and I will

ask you whether or not these questions were not asked of you and these answers given:

"Q. I am asking you, is that your plant or someone else's?"

These are merely preliminary.

"A. It is someone else's.

708 "Q. It is a corporation?

"A. Yes.

"Q. And you own 25 per cent of the stock?

"A. I want to correct that. I don't own any of it."

A. That is right.

Q. So you don't own any of the stock?

A. No, sir.

Q. And during that same, at the same time that you were taking the deposition you did tell them at that time that you wanted to correct that statement and said that you didn't own any of the stock of Prawns?

A. That is correct. I remember it now.

Mr. Clayton: That is all.

The Court: Any redirect?

Redirect Examination by Mr. Kohn.

Q. Mr. Appelbaum, I hand you Plaintiff's Exhibit 31 again and call your attention to the sales figures of the top column for the eight months' period of '54—1953?

A. That is right.

Q. You will notice the '54 figure is a million and one-half dollars, approximately, is that correct?

709 A. That is right.

Q. Would you say it was about 90 per cent of that involved sales of shrimp?

Mr. Clayton: Might I interrupt just a minute?

The Court: Yes.

Mr. Clayton: Apparently, your Honor, he is questioning him from a financial statement, I think, dated August 31, 1954.

Mr. Kohn: Yes.

Mr. Clayton: That has not been introduced in evidence.

Mr. Kohn: That is right. I am just trying to refresh his recollection.

Mr. Clayton: If you have no objection, so that it can go in, we will either introduce it or if you want to introduce it, we have no objection.

Mr. Kohn: No, I do not want it introduced. It will

clutter up the record. I am trying to get some rough figures from the witness, on two or three figures.

The Court: If, after he refreshes his recollection from it, if you think it is material to the defendant's case
710 and I agree with you, I will permit you to reopen your case and introduce it.

Mr. Clayton: All right, your Honor.

By the Witness:

A. I don't remember what these sales consist of. I would not hazard a guess now whether it was 90 per cent of shrimp or what percentage.

By Mr. Kohn:

Q. Would you say it was 80 per cent?

A. As we were handling the Icelander fish, that was—how much of the volume it was or what percentage, I don't recall.

Mr. Kohn: That is all.

The Court: Any recross?

Mr. Clayton: No recross, your Honor.

The Court: That is all. You may step down.

(Witness excused.)

The Court: Further rebuttal?

Mr. Kohn: Mr. O'Brien will now examine Mr. Olson.

The Court: Very well.

711 ROY OLSON, called as a witness herein on behalf of the Plaintiff, in rebuttal, having been heretofore previously duly sworn, was examined and testified further as follows:

Direct Examination by Mr. O'Brien.

Q. You are the same Mr. Olson who testified here previously?

A. Yes, sir.

Q. State your full name.

A. Roy Olson.

Q. Mr. Olson, have you prepared a computation showing a statement of credit due plaintiff from the defendant with interest at 5 per cent thereon, computed to June 15, 1955?

A. Yes, sir.

Q. Did this statement of credits reflecting interest due, or rather was it based on a total credit of $198,838.09?

A. Yes, sir.

Q. Now, Mr. Olson, this is a document that we are discussing for the first time in this court room, isn't that correct?

A. Yes, sir.

712 The Court: What is that figure again, 198—what?

Mr. O'Brien: $198,838.09.

The Court: Go ahead.

By Mr. O'Brien:

Q. I show you a document marked Plaintiff's Exhibit 19-A for identification, Mr. Olson, and ask you if that reflects your computations of interest on this sum of $198,000-plus?

A. Yes, sir.

Mr. O'Brien: At this time I will offer Plaintiff's Exhibit 19-A for identification into evidence as Plaintiff's Exhibit 19-A.

The Court: It may be received.

(Said document, so offered and received in evidence, was marked PLAINTIFF'S EXHIBIT 19-A.)

The Court: Is that the interest computation?

Mr. O'Brien: Yes, sir.

The Court: What does it total?

Mr. O'Brien: I will read this, your Honor:

Plaintiff's Exhibit 19-A is a document entitled "Statement of Credits Due Plaintiff from Defendant with
713 Interest at 5 Per Cent Thereon Computed to June 15, 1955." The total credits involved in this document is $198,838.09.

The Court: Does that include interest?

Mr O'Brien: No, sir.

The interest on this total sum as this sum accrued totals as of June 15, 1955, $16,994.44.

By Mr. O'Brien:

Q. Mr. Olson, I would like now to direct your attention to your previous testimony concerning the review you made of the defendant's books and records.

I ask you, Mr. Olson, if in your review of the defendant's books and records, whether or not any transactions were disclosed between Penguin Frozen Foods and a company called Prawns, Inc., during 1953?

A. Yes, sir.

Q. And what book or record of the defendant did you find this record of transactions in?

Mr. Clayton: At this time, your Honor, I will object unless he specifies what the transaction was.

Mr. O'Brien: Your Honor, we are leading up to that.

The Court: You intend to bring out the transaction?

714 Mr. O'Brien: Yes, sir.

The Court: Very well. You may proceed.

By the Witness:

A. The general ledger of the company contains an account "Advance to Suppliers." In that account is an entry indicating an advance during September, 1953 to Prawns, Inc., of $40,946.85.

The Court: September, what year?

The Witness: 1953, during October, 1953, there is an entry indicating an advance of $101,000 and in November, 1953, there is a further entry indicating a net advance of $67,594.79 for an aggregate during the three months of $209,541.64.

Mr. Kohn: If the Court please, at this time, I would like to ask the Court to read the stipulation.

The Court: No. We will finish with the witness.

Mr. Kohn: It may have a bearing on the witness.

The Court: Finish with the witness.

By Mr. O'Brien:

Q. Mr. Olson, I show you Plaintiff's Exhibit 17, sometimes referred to in this proceeding as the Sprecher memorandum and I ask you if the total reflected there,

715 what relationship the total credit reflected there has to the total credits you used in computing your interest as set out on Plaintiff's Exhibit 19-A.

A. The amount shown on the Sprecher statement is $198,153.81. The amount shown on Plaintiff's Exhibit 19-A is $198,838.09.

Q. Where did you get your figure, the total credits you used in Plaintiff's Exhibit 19-A, Mr. Olson?

A. The amount shown on Plaintiff's Exhibit 19-A, $198,838.09, is the amount shown in the company's general ledger account with Reno adjusted for $15,000 which was indicated to be an entry merely for income tax purposes.

Q. Now, I show you Plaintiff's Exhibit 18, Mr. Olson. Your statement that we went over, that we went through

the other day, and I ask you what difference there is between the total reflected on Plaintiff's Exhibit 18 and the total used in this interest computation here, 19-A, just the rough difference. I don't want you to go into detail.

A. The statement as previously shown, 18, Plaintiff's Exhibit 18, shows an amount of $207,784.39 as compared with the amount on which the interest computation was made of $198,838.09.

Q. I see. Now, your opinion or your view, however, Mr. Olson, based on your review of the defendant's books and records, is that the total credit outstanding as reflected in Plaintiff's Exhibit 18, is that correct?

716

A. Yes, sir, $207,784.39, subject to possibly adjustment for two items which were not clear.

Q. Now, the two items amounted to what, Mr. Olson, just so that we have it straight?

A. $3,093.93.

Mr. Clayton: I think, your Honor, we went into that the other day with Mr. Olson.

The Court: Yes. It is repetitious.

Mr. O'Brien: Your Honor, it is a little bit. There are so many numbers before the jury.

The Court: It is repetitious. Get on to something else.

Mr. O'Brien: That is all we have.

The Court: Then stop.

Mr. O'Brien: At this time.

The Court: All right. Then stop.

You may cross-examine him.

Cross-Examination by Mr. Clayton.

Q. Mr. Olson, in the computation of interest you in your memorandum listed certain dates which you alleged that certain amount of credit became due, is that correct?

717

A. Yes, sir.

Q. Based upon the fact, the assumption, that that amount of credit became due on the date specified, you then computed interest at the rate of 5 per cent to the date mentioned in that memorandum, didn't you?

A. Yes, sir.

Q. Now, if that amount, of course, did not become due on the date specified, your interest computation would be altered accordingly, wouldn't it?

A. Yes, sir.

Mr. Clayton: That is all.

The Court: That is all. You may step down.

(Witness excused.)

The Court: Do you want to read the stipulation at this time?

Mr. Kohn: Yes, sir.

The Court: And of the income tax return and computation?

Mr. Clayton: Just one observation, we wanted to make, your Honor, with respect to Plaintiff's Exhibit 19-A. He sets forth that on certain specified dates certain credits
718 accrued. Our contention is that they did not accrue on those dates. I say it is the province of the jury to determine that.

The Court: I agree with you.

Mr. Clayton: When they became due.

The Court: And I will expect you to argue that to the jury. I will expect the jury to answer the question when the right time comes. In fact, they are the only ones who can. There is no use of my answering it. It wouldn't mean anything.

Mr. Kohn: If the Court please, under our theory of the case which we will argue later, it is a matter of law when that accrued.

The Court: I am inclined to disagree with you. You be prepared to argue it to the jury.

It is now stipulated and agreed by and between the parties hereto, by their respective counsel, that the 1954 income tax return, form 1065, filed by the Penguin Frozen Foods, 120 South La Salle Street, Chicago, Illinois, a partnership, shows a total ordinary net income for the partnership during the calendar year, 1954, of $32,833.60;
719 that of that amount the following sums were paid to the following three partners in the amounts indicated, which three partners devoted 100 per cent of their time to the business of the partnership and received therefor these sums in lieu of other compensation:

To Partner Henry Appelbaum	$11,377.81
To Partner Stewart M. Appelbaum	8,877.81
To Partner Robert D. Appelbaum	6,377.81
A total of	$26,633.43

of the total net income of the partnership paid t the three partners who devoted 100 per cent of their time to the affairs of the partnership in compensation, or in lieu of compensation, for their services leaving remaining of the net income of the partnership $6,200.17 for distribution to the partners who did not devote their time to the business of the partnership.

Does that correctly state your stipulation, gentlemen?

Mr. Clayton: Yes, your Honor.

Mr. Kohn: Yes.

The Court: Let the record so show.

Mr. Clayton: Is it necessary to make my objection, or is that necessary?

The Court: No. Do you want to put this back in
720 your pocket now?

Further rebuttal by the plaintiff?

Mr. Kohn: No further rebuttal.

We now have some motions.

The Court: The plaintiff rests?

You have finished your rebuttal?

Mr. Kohn: Yes.

The Court: The jury will be excused until 10:00 o'clock tomorrow morning.

721 The Court: I will hear your motions.

One minute, before the jury goes, do you want this document received or not?

Mr. Clayton: Yes, sir.

The Court: I am sorry, I forgot about it.

Do you want to re-open the defendant's case?

Mr. Clayton: For the purpose of introducing Defendant's Exhibit 89.

The Court: Is there any objection to the receipt of Defendant's Exhibit 89?

Mr. Clayton: No.

The Court: I am permitting the defense to re-open its case in order to offer Defendant's Exhibit 89.

Mr. Clayton: This is the financial report as of August 31, 1954, of Penguin Frozen Foods.

The Court: Very well, it is received in evidence.

(Said document so offered and received in evidence was marked DEFENDANT'S EXHIBIT 89.)

The Court: Do both sides rest?

Mr. Kohn: That is right.

Whereupon Both Sides Rested Their Case.

The Court: Very well, you are now excused until tomorrow morning.

(Whereupon the following proceedings were had in
722 open court out of the presence and hearing of the Jury:)

Mr. Kohn: I have here, if the Court please, a motion for a directed verdict at the close of all the evidence in writing.

The Court: You mean as to the counterclaim?

Mr. Kohn: As to the entire case.

The Court: Yes.

Well, pursuant to the Rules of Civil Procedure, the same will be taken under advisement by the Court until after the return of the verdict by the Jury.

Mr. Kohn: I have served a copy on the defendant's counsel, and they have given me a similar motion.

The Court: After the return of the Jury, if that return is unsatisfactory, you may argue this, together with any other appropriate motions in the same briefs which I will give you leave to file after the return of the verdict of the Jury.

You have, I assume, a similar motion?

Mr. Clayton: Yes, sir, a motion for a directed verdict on behalf of the defendant at the close of our case.

The Court: That, likewise, under the Rules of Civil Procedure, may be filed at this time and will be taken under advisement by the Court until after the return of the Jury.

Both of these motions and similar motions, notwith-
723 standing the verdict, and for judgment, et cetera, may be argued, and for a new trial, by whichever or both of you might be aggrieved by the jurors' verdict.

Mr. Kohn: The ruling will be reserved on mine?

The Court: Certainly, under the Rules of Civil Procedure.

How long a time do you want to argue, so we can figure our ground work here?

I will advise you in the morning as to my proposed charge to the Jury, and you are entitled to be advised of it before you argue.

Now, how long do you expect you would like to argue? Since there is a counter-claim, you can also reply, so you can each divide your time. You will each open and close as to your part of the case.

Mr. Kohn: He can only reply as to the counter-claim.

The Court: As to the counter-claim, yes, but he can also reply to your argument on his counter-claim.

Mr. Kohn: But I open.

The Court: It sounds complicated, but it means is you will divide your time. You will open and close as to the plaintiff's case. He will also open and close as to the defendant's counter-claim.

Mr. Kohn: It is pretty hard to draw a line between the two.

724 The Court: I will draw it.

Mr. Kohn: Well, I would say my opening argument would take about fifteen minutes. How long a time am I going to be allowed altogether?

The Court: That is what I am asking you. How much time would you like?

Mr. Kohn: Well, I would like an hour.

Mr. Clayton: About an hour and a half.

The Court: Tomorrow is a holiday? What is tomorrow?

Mr. Kohn: Flag Day.

The Court: Mr. Marshal, tell them the Flag will be raised over the court house at the usual time, and they will be here.

Mr. Kohn: If the Court please, I think an hour would be ample for me, for both opening and closing.

The Court: Does that sound all right to you?

Mr. Clayton: An hour and a half, because I cannot talk as fast as learned counsel, Judge.

The Court: Here is the problem. I think that the case—it is not complicated, but it is rather lengthy. There are a lot of documents that are going to have to be reviewed. So, in fairness to both of you, I would like the Jury to adequately consider the various issues in the case, and to consider your argument. If we give a half a day, as we will, on argument, and in instructions, and they get

725 the case in the middle of the afternoon, they are not going to have ample time to consider. They may come to some snap judgment in order to get home at a reasonable hour in the evening.

I would suggest this. It will take a little time for me to advise you in the morning as to how I intend charging the Jury. Then I will give your associate an hour and a half, and I will give you the same length of time. You will complete your arguments tomorrow.

Then I will instruct them Wednesday morning, and they will have all of Wednesday afternoon to deliberate, and I think that will be fair to both of you.

It would be fair to neither one of you if you sent the

case to the Jury during the middle of the afternoon. They have heard about four or five days of testimony, and have a lot of documents to read. They look like reasonably intelligent jurors to me. I am sure some of them, if not all, will want to read all of these exhibits. Judging by my own time in reading them, that is going to take five or six hours, even if they pass one document to another—one juror to another, passing one document at a time.

So, if you send it to them in the middle of the afternoon, neither one of you will get a fair consideration from the Jury. If you want an hour and a half for argument, I
726 will give it to you, and that is to be divided between your opening and closing arguments. We will finish the arguments tomorrow, and I will instruct them Wednesday morning, and then send them out to deliberate.

Does that sound agreeable to both of you?

Mr. Kohn: It is agreeable to me.

Mr. Clayton: Yes.

The Court: I think both of you will get fairer consideration if we do it that way.

We will recess at this time until ten o'clock tomorrow morning.

(Whereupon an adjournment was taken in the above-entitled matter until Tuesday morning, June 14, 1955, at ten o'clock a. m.)

727 Before Judge Campbell, and a Jury, on Tuesday, June 14, 1955, at 10:00 o'clock a. m.

Court convened pursuant to adjournment.

Present:

Mr. Louis A. Kohn and Mr. Patrick O'Brien appeared on behalf of plaintiff;

Mr. Robert A. Sprecher and Mr. Joseph Clayton, appeared on behalf of defendant.

728 The Clerk: 53 C 2482, Refrigeradora Del Noroeste *vs.* Appelbaum, on trial.

The Court: Now, gentlemen, I have here a copy for each of you of my proposed interrogatories and I will give you now, pursuant to the Rules of Civil Procedure, a brief resume of how I intend instructing the jury. The follow-

ing will be the charge in substance to the jury. First of all, let me inform you that where your instructions proffered by both sides contain what I regard as an applicable principle of law, I am giving the principle. I am not giving a repetition that occurs frequently in the defendant's instructions and occasionally in the plaintiff's proffered instructions. I also may give the principle of law involved in other words. In the main, these will be the instructions:

The jury will first be instructed they are to consider all of them as a connected series of instructions. That is a stock instruction usually given. I will summarize the pleadings for the jury and then will caution them that the complaint of the plaintiff and the answer of the defendant are merely the unsworn statements of the parties, not proving or tending to prove any of the allegations of the case.

I will then instruct them that when they go to their jury room for a consideration of the case they will first
729 determine whether or not the defendant is guilty as charged in the complaint and the plaintiff is guilty as charged in the counter-complaint and that in a natural sequence of the consideration of a case of this kind they must first consider whether or not the parties are liable before they get to the question of damages.

I will then instruct the jury that the plaintiff in this case is seeking to recover for payment of merchandise shipped pursuant to the agreement; that in order for it to recover it must show by a preponderance of the evidence; that it had fully and completely carried out and performed its obligations under the contract.

I will further instruct the jury that the contracts between the parties dated October 19, 1950 and July 22, 1952, whereby their terms to continue to exist until August 15, 1954.

I will then tell the jury that the defendant contends that his telegram of February 25 from the plaintiff to the defendant stating that the plaintiff was to cancel the contract between the parties constituted the natural or an anticipatory breach in repudiation of the contract by the plaintiff. That is the defendant's contention.

Then I will give the legal definition of what is meant by breach of contract. I will then give the legal defini-
730 tion as to what is meant by anticipatory breach of the contract. I will then give the instruction that an anticipatory breach or repudiation can be nullified when

statements constituting such a repudiation are withdrawn by information to that effect given by the repudiator to the injured party before he, the injured party, has brought an action of the breach or has otherwise materially changed his position in reliance on them.

I will then define what is meant by a reinstatement of a contract once having been breached and give the various elements necessary to constitute reinstatement.

I will then instruct the jury if they find from a preponderance of the evidence that the plaintiff may have without just cause desired or attempted to terminate the contract, severed it and that later on each side agreed upon their desire and willingness to continue to perform under the contract; if that form or desire or attempt to terminate on the part of the plaintiff would not under those circumstances justify the defendant's failure to make payments provided for under the contract or would it permit the defendant to add conditions not authorized by the contract upon which his own continued performance was to depend.

I will further instruct the jury that should they find
731 by a preponderance of the evidence that the defendant failed to make payments as provided for in the contract pursuant to receipt by it or sold by the plaintiff, the plaintiff is justified in refusing to make further shipments and such refusal under such circumstances would not constitute a breach of the contract. However—this is now one of the defendant's instructions on the same point—if you find from a preponderance of the evidence that the defendant paid the plaintiff, with the plaintiff's consent for each car load or shortly after each car was sold out, payment would be due the plaintiff from the defendant only after each such car had been so sold out.

I will then give the customary instruction on burden of proof and the preponderance of evidence.

I will then give the customary instruction on the weight of the evidence and the credibility of the witnesses for the sole determination of the jury. I will give the elements which they are to consider in testing of the credibility of each witness.

I will then give the customary instruction on circumstantial evidence. A fact may be proved by circumstantial evidence or by direct evidence or by both and I will define circumstantial evidence.

732 I will then give the customary instructions they are not required to believe any fact to be a fact simply because some witness or witnesses may have stated it to be a fact if they feel that the witness may have been wrong or incorrect when they had testified falsely.

I will then give the customary instruction on the method by which a witness may be impeached. I will then give the customary instruction on the plaintiff taking the stand, or the defendant in this case taking the stand in his own behalf.

I will give the customary instruction on employees of the plaintiff taking the stand. I will give the customary instruction that in passing upon their verdict and in considering the case they are not to set aside their own common observation and experience as men and women in the affairs of life; that they may take their common sense with them into the jury box and into the jury room.

I will give them the instruction on damages and if they find from a preponderance of the evidence that the defendant is entitled to recover damages on his counter-claim then I will define what damages mean and I will state that in awarding damages they should try and place the injured party, that would be the defendant in this
733 case, on his counter-claim, in as good a position as that in which he would have been put by a full performance of the contract, at the least cost to the guilty party and without charging him with harms, that he had no sufficient reason to foresee when the contract was executed. In other words, damages, if any, shall be measured by the loss of the profits that the injured party would have realized if the contract were to have been performed.

I will then give the instruction that damages cannot be arrived at by mere speculation or conjecture but must be proved by a preponderance of the evidence and also that they can follow only after they find that the contract is in full force and effect and has been breached.

I will then give the customary instruction that the fact that I instruct them on damages or the fact that counsel for either side has discussed the subject with them should not be taken as an admission by counsel or the direction by the Court of any liability on the complaint stated.

I will then instruct them on the general duty to determine the questions of fact and upon their further duty to follow the law as I had given it to them in the instructions.

I will then give the customary instruction on sym-
734 pathy and prejudice which have no part in their deliberations and that they should decide the case on the evidence as they have heard and on the law as I have given it to them.

I will instruct them as to their equality of both of these parties before the Court; that they both come in on the same plane and are entitled to the same fair and unprejudiced treatment.

I will give the instruction that the plaintiff in this case, which is a Mexican or a foreign corporation, and as such is entitled to the same fair and impartial treatment as would be the domestic citizen and that the case is to be considered the same as if it were a case between two private citizens, instead of one being a corporation and the other an individual. That, in the main, gentlemen, will be the charge.

Opportunity will be given to you to object to the charge of the Court after it is given and before the jury retire.

I will at this time hear any suggestions you may have after the interrogatories.

735 Mr. Kohn: If the Court please, on Interrogatory No. 1, I would like to make this suggestion. You have provided here that the interest, if any, is to be determined by the Jury.

I commented to the Court yesterday briefly that it seemed to me it is a question of law, because interest—

The Court: It is not a question of law, but it is a question of computation.

Mr. Kohn: Well, it is a mixed question.

The Court: Yes, I thought of that.

If both of you agree that you want the Court to exclude interest, then I can compute it at the legal rate.

Will you step up, Mr. Clayton, or whoever will speak for the defendant?

Mr. Kohn: My point is this, that the interest in this case is provided by virtue of the Illinois statute which provides for interest on written instruments.

The Court: I know, but unless you want the Court to reserve the computation of interest, I am going to have to submit it to the Jury, because it is a Jury question.

Mr. Clayton: We feel it is a Jury question.

The Court: Then I will—

Mr. Kohn: I want to say one more thing, and then
736 I will never mention the point today again.

The contract provided for payments each month, and therefore we make computations of what was due each month.

The Court: That is in evidence.

Mr. Kohn: That is in evidence.

The Court: That is right. They have that. If they agree with you that that is due, then they can include it in whatever they allow you or such portion of it that they think is due, depending on their construction of the evidence.

Then, you would leave No. 1 as it is, Mr. Clayton?

Mr. Clayton: With the exception it should be up to August 15th, I think it is.

The Court: I was wondering about that. August 15th, that is right. You want that to show August 15th. That is the termination date of the extended agreement.

The next one merely requires an "x" on it, and they will be given a definition of what is meant by breach.

The third one is the amount of damages if they find there was a breach.

I think those three interrogatories present the issues of the case to the Jury, and if agreeable with you, I
737 think their understanding of your argument would be greater if we give them—I don't mean give them, but read to them the three interrogatories first before you start your argument, and each of you have a copy, if you want to refer to them in your argument, and they will understand what you are talking about.

Don't you think that will be helpful?

Mr. Kohn: I think that is fine.

The Court: Is that agreeable?

Mr. Clayton: Yes, sir.

I am wondering, if your Honor will instruct the Jury that they should fill in the amount on 1, and 3?

Mr. Sprecher: I think they mention to fill in one or the other. I think they might do it.

The Court: No. I think it is clear that they can fill in one or the other. Let's see how they answer the interrogatories and then we will decide how—

Mr. Kohn: If we should decide to file an objection or two to interrogatories, we will present it in writing tomorrow morning.

The Court: You don't have to. You have to wait until the charge is given.

Mr. Kohn: That is what I mean.

738 The Court: And then you will be given an opportunity to object in chambers out of the hearing of Jury before the Jury retires.

Mr. Kohn: Thank you.

The Court: Certainly, the rules provide for that.

All right, bring in the Jury.

(Whereupon the following proceedings were had in open court in the presence and hearing of the Jury:)

The Court: Good morning, Ladies and Gentlemen.

Now, Counsel have requested and I have allowed one hour and a half per side for argument. There are a good many written exhibits, some of which Counsel for each side may want to read to you in their argument, and there are a good many matters to be covered. I think an hour and a half per side is not excessive, although I don't ordinarily allow that much time.

However, considering that, and with the usual noon recess, if we were to have the arguments today and the instructions to the Jury, you would not get the case until rather late in the afternoon, which would mean you would have to start your deliberations at night.

Therefore, Counsel for both sides have agreed with me that we will hear argument of Counsel today, an
739 hour and a half per side, and then we will recess until tomorrow morning when I will instruct you and you can begin your deliberations in the morning, instead of having to start them at night.

Now, before Counsel commence their argument, I should tell you that I have also considered the pleadings filed in this case, and the evidence as you have heard it, and as I have heard it, as we have gone along. Rather than submitting this case to you on the customary stock verdict forms, that is to say, you find for the plaintiff or you find for the defendant or you find this much, and all of that, I think it will be easier for you in view of the somewhat intricate commercial transactions that are involved, if instead of submitting legal issues to you by way of a general verdict, which might confuse some of you, I gave you just three questions to answer.

If you answer those three questions, I will be able to frame the judgment on your verdict.

The first question is: (Reading)

"What sum, if any, including interest, if any, expressed in dollars do you find should be credited to the plaintiff

by the defendant for the quantity of shrimp delivered to the defendant by the plaintiff up to August 15, 1953?"

And, there is a blank for dollars which you
740 can write in what sum, if any, you find.

The next question reads: (Reading)

"Do you find from the preponderance of the evidence that the plaintiff breached its contract with the defendant?"

There are two boxes there; one, "Yes," and one, "No." At the proper time I will instruct you what in law constitutes a breach. You will find did he or didn't he, and you you will answer yes or no.

The third question is: (Reading)

"If your answer to special interrogatory No. 2 was, 'Yes,' —" that is, if you find that the plaintiff did breach its contract with the defendant—"'—then what is the amount of damages, if any, that you find due the defendant as a direct result of the plaintiff's breach?"

Those are the three questions that after their argument and after my instructions we are going to ask you to answer. Your answers to those will be given, and I will frame the judgment on them accordingly.

You may proceed with your closing argument.

Opening Argument on Behalf of the Plaintiff By Mr. Kohn.

May it please the Court, Ladies and Gentlemen:

If it is any comfort to you, I doubt very much
741 whether I will take the entire hour and a half that has been so kindly allotted to me. You have been here for more than a week, and you have been exposed to many thousands of words, and almost a hundred documents. You have paid very close attention and have been most attentive. I am sure you will be able to separate the wheat from the chaff.

You will recall on my opening statement that I said the case would be divided into two phases: One is the plaintiff's case which is represented by Interrogatory No. 1 which the Court has read to you; the second part of the case revolves around the defendant's counterclaim which now is represented by this Interrogatory No. 2.

There was another part of the counter-claim that is already out of the case by virtue of the Judge's instruction yesterday regarding the breading contract.

I stated to you at that time that plaintiff's damages would be in excess of $200,000. I said possibly $210,000. I think you will agree with me that claim was not extravagant. Many claims are extravagant in suits that are

filed in court. I believe the evidence, as we will show shortly, renders the claims well in excess of $207,000, not including interest. At the same time, Mr.
742 Clayton stated to you that the defendant's claim would be in excess of $330,000.

Today the claim based on the damages for breading the shrimp is already out of the case, and as we shall show when we come to the question of damages, there is no evidence of any damage suffered by the defendant in accordance with the requirements of the law as the Court will later direct you.

Now, there is one thing in this case that even the defendant has not had the audacity to deny: that is, that they received eight carloads of shrimp during the season 1952 to 1953, ending August 15, 1953.

But their own admissions, although the defendant himself is reluctant to admit it at one time or another, but the evidence is clear from the accountant, Mr. Olsen, and Mr. Appelbaum's son, from the memorandum which Mr. Sprecher sent us, that the plaintiff was entitled to a credit of $199,000. Now, that is one fact that is uncontrovertible.

In addition, as the result of the Judge's action, the Court's instruction, the $4,816 item representing expenditures in connection with the breading of shrimp is no longer a proper deduction. That brings the claim up to approximately $203,000.

Now, in addition, Mr. Olsen, a Certified Public
743 Accountant testified there was an item of $2,992 which represented a rebate and storage handling, together with another item of $1,136, representing excessive charges on storage and handling which Mr. Appelbaum admitted at one time was a proper adjustment in favor of the plaintiff.

As regards both these items, he said, "Certainly, we didn't have to pay all this money out because of our business relations on this situation. We obtained certain special rates."

Now, the contract provided that deductions could be made for expenditures, and the contract has been read in evidence.

But, notwithstanding these expenditures were not actually made, the defendant has taken upon himself unilaterally to not give us the proper adjustment. We say we have proven that these items total more than $4,000, which brings the total down to $207,784.39.

There were two other items which Mr. Olson honestly said he could not say were improper, but he could not say they were proper.

Now, the defendant has the evidence in his own records. It was their obligation to come forth with the true story on it. They failed to do that.

744 We maintain that the total claim is $210,878.29, not including interest, which under our contention accrued each month in accordance with the contract on the 15th of the month when these reports which were provided for in the contract were to be made, and at the same time remittances were to be made. That is crystal clear under the terms of the contract.

By way of summary, we say to you that plaintiff is entitled to then recover in the principal sum that I have just given to you; that the plaintiff has at no time prior to the actual date of performance actually breached the contract; that it was justified in terminating the contract when it did in October, 1953, because of the defendant's insistence that it was not required to make the payments then due which were well over $100,000, as the evidence has shown.

Finally, even considering everything that the defendant has contended for here is correct, they have failed to meet their burden in showing the damages and that they were actually sustained. The Court will direct you as to what the measure of damages are in a case like this.

It is limited to actual damages. In a breach of contract, the wronged party can only recover for the
745 profits that he would have earned had the contract been in full force and effect, and had he fully complied.

Now, as to whether or not the plaintiff breached the contract. The facts are hardly in controversy, the material facts. First of all, we have this contract that is in evidence, and both parties are relying on it. It is dated in October of 1950, as you know, and provided for extensions from year to year automatically unless either of the parties gave notice prior to March 1st of each year.

The contract was automatically extended until the beginning of the 1952-1953 season. At that time a new agreement which incorporated all of the provisions of the October, 1950, agreement, with two or three minor exceptions, and the important provision in that contract was that the agreement would definitely extend until August, 1954. It also provided that there would be a different rate of commission depending on whether or not the defendant did the financing.

It further provided that the defendant did not handle other shrimp production without the approval of the plaintiff.

Now, these two documents must be read together and the essence of the documents is that the plaintiff was
746 to sell the defendant all its shrimp which was produced in the West Coast Mexican area. The defendant was to handle no other line of shrimp. It was a provision that up to ten per cent would be held back for Mexican sale.

The most important provision as far as the controversy before you today, is the provision that I have previously referred to, and is these monthly reports and remittances.

The contract was performed satisfactorily apparently for the '50-'51 season, '51-'52 season, and then we get into the '52-'53 season.

The plaintiff some time prior to February, 1953, was advised by Mexican counsel that it had a right to terminate the agreement, apparently on the theory that the October, 1950, agreement was in full force and effect, so that any time prior to March 1st of that year notice could be given to the defendant.

So, on February 28th this notice that you have heard so much about was given.

Now, we do not know exactly what Mexican counsel had in mind. We have no copy of their opinion. But, it should be noted that the extension agreement was signed by Mr. Saenz, and another director. They were not
747 officers of the company. What the reason was is really immaterial, as I shall show.

By the way, Mr. O'Brien reminds me that February, 1953, that notice was February 25th, is that correct?

Now, with that statement of facts before the plaintiff they naturally considered long range plans for distribution of shrimp. Negotiations or discussions had been had with Mr. Jack Willis, an outstanding man in that field. The defendant learned about this, I believe, as early as April, 1953.

Mr. Clayton in his opening statement said they resorted to devious and various ways, and they took steps so that they could not be traced, or words to that effect.

Now, this is not correct.

The Plaintiff and its officials laid their cards on the table. After an extended correspondence, Mr. Appelbaum came to Mexico. You recall he was in Mexico City and

Mazatlan. There were numerous discussions. He manifested interest in this new proposal whereby a number of Mexican West Coast producers were joined together in a new sales set-up.

The evidence shows that they represented a third of the West Coast area production, and I believe the plaintiff's share of it was about 20 per cent. There was an effort
748 to include the defendant. There was no animosity as far as the plaintiff or its officials were concerned toward the defendant.

These men were honest. You saw them take the stand. They are decent businessmen trying to do the best job for their company. They were trustees for their company. There were bondholders involved. There was the Mexican agency, the Nacional Financiera that was involved in the picture.

749 It was a heavy creditor and the largest stockholder. Certainly we cannot find fault with these gentlemen trying to do what they thought in good faith was the best thing for the Company and all the people they represented.

Now, the mere fact they were dealing with Mr. Willis in this new set-up of Crest and E. A., which was formed is certainly not inconsistent with the intention of the plaintiff as I shall hereinafter point out to go on with the contract for the remainder of the July, 1952 extension. That is, the end of the 1953-1954 season.

The evidence will show, and this is not in dispute, that even after the notice was given in February, 1953, they continued to make shipments of shrimp under the contract.

So, what was the defendant's reaction to all this?

As I said before, he manifested interest in the new set-up. He came to Mexico. Nothing came of the conference. He then sent a number of wires and insisted that the plaintiff send a representative to Chicago. That resulted in the famous conferences that you have heard told so many times that occurred in September, beginning on the 18th, and continuing, with an interruption, until we had all the principal parties involved represented, culminating in
750 a conference in which Mr. Collenburg, Mr. Clinton, Mr. Appelbaum, his son, Mr. Fraustro, and Mr. Willis were all present.

On this one point there is absolutely no controversy as to what occurred. Various propositions were considered back and forth. One possibility was a sub-brokerage arrangement. I don't believe the details are important.

There was a discussion there that if such an arrangement were entered into, the defendant asked for security or a guarantee of some kind. They talked about the possibility of the defendant at the same time he was a sub-broker buying shrimp on his own. Mr. Willis objected.

Finally, it was made apparent that the plaintiff felt obligated by the contract and intended to go on with it, unless a settlement could be made.

It is perfectly proper for business men to endeavor to liquidate contractual obligations by making reasonable settlements. It was the purpose of Mr. Collenburg being there, with the result that $40,000.00 was offered, and nothing came of it. Thereafter followed an exchange of wires, which I think are very significant in this case.

It is apparent that by the time that the conference
751 started in Chicago that the plaintiff was ready to withdraw its notice of termination. It is fair to assume that Mr. Collenburg's being there that they had consulted American counsel and reached a different conclusion than the one that they had had earlier regarding their right to send this notice of termination.

At the conclusion of the conference, I think all the testimony shows that it was agreed by those representing the plaintiff and by the defendant, there was nothing to do but go on with the contract.

Thereafter these communications were sent back and forth and you will bear with me a few minutes, I am going to spare you the job of reading them today, Mr. O'Brien.

Here is a wire, Plaintiff's Exhibit 12, contained in the following letter dated October 3, from plaintiff to defendant:

(Reading.) "Herewith enclosed you will find copy of our today's wire which contents are self-explanatory and which reads as follows:

'This is to advise you that Board Directors of this Company at meeting of yesterday confirmed extension letter July, 1952 Stop Therefore contract remains in full force and vigor and Directors hereby request payment to
752 Bank America on or before Wednesday, October 7, 1953, of all sums due as a result your sales to date our shipments anticipate shipping first car around October 9th this simultaneously payment Bank American open letter credit to cover this first shipment stating market prices all sizes accordance our contract.'

"We thus await the payment as requested and you must fully realize that the retention by you of the funds due us has caused so far grave damage to our company and any further delay could result in our financial failure."

That was followed by the following reply—mind you this was the result of the Board of Directors' action, after Mr. Fraustro reported as to the results of his trip to Chicago a week before, I believe it was. This is the wire from the defendant to plaintiff:

"Gratifying at long last to have you acknowledge your responsibility under our contract together with statement of your intention to perform. Inasmuch as you specify
use of letters credit assume you are returning seven
753 per cent commission arrangement. All this by agree-
ment. However, in light of my recent experiences I am entitled to adequate security for your performance. Puzzled by your direction of only one letter of credit when heretofore you have requested five or more at the opening of season. Nevertheless, letter of credit opened. Banco Occidental at the following prices * * *"

which I will not quote. It is signed, "Henry Appelbaum—Frozen Foods."

Now, I will discuss that question of security later.

The next wire from plaintiff to defendant dated October 7:

(Reading.) "Commercial relations renewed under original contract and extension, your cable omits confirmation that require payment according to our previous cable has been made. We categorically demand it."

And then came a wire from defendant to plaintiff dated October 8:

(Reading.) "We will continue to remit for cars as
754 completely sold out in accordance with past practices
so long as you live up to your agreement."

That is the first time that suggestion has been made.

And then comes the final wire, October 20, defendant from plaintiff:

(Reading.) "Your failure to comply with our wire of October 3 and pay over to us or to First National Bank for our account the amount you owe for shrimp sold by you is most serious breach of contract on your part and we refuse to send you any more shrimp for resale to you in U. S. A. Stop

755 "We demand that you promptly deliver to First National Bank, Chicago, for our account all warehouse receipts covering unsold shrimp sent to you by us and we demand that you immediately pay same Bank the balance you now owe which you stated our attorney Collenburg on October 14, as being approximately $140,000.00."

It is signed by the plaintiff.

Now, as that wire indicates, after the September conference and after the previous wires had been sent, Mr. Collenburg, and his testimony is undisputed, called Mr. Appelbaum and the substance of the conversation, which I might not elaborate, was that Mr. Appelbaum admitted that the plaintiff was a creditor to the extent of $140,000. Mind you, this is October 14. That is a significant date, and the amount is significant, as I will later show.

Mr. Collenburg discussed the matter of guarantee. Mr. Appelbaum wanted assurance from Nacional Financiera. The result of it was it was clear to Mr. Appelbaum that the plaintiff intended to go on with the contract and expected him to comply and go on with the contract in accordance with its terms.

756 There is no question that the plaintiff at all times was ready, willing, and able, to start the '53-'54 shipments of shrimp that ordinarily began in October of each year.

Now, this talk about security or guarantee that you will be hearing so much about. We submit it is not made in good faith. When the defendant, much to his surprise, because he certainly had reason prior to September to have some doubt as to whether or not the plaintiff was going on with the contract—and I don't criticize anything that the defendant has done up to and including the time of the conference. But, from that point on it is clear that he himself did not want to go on with the contract, and I will tell you why later. The truth has finally come out in this case as to what has motivated all this subterfuge and spurious reasons that have asserted, and you will hear again today.

In the September meetings the word guarantee came up in connection with the sub-brokerage. There is no provision in the contract for a guarantee. The plaintiff and the defendant signed a contract. The defendant at all times has been insisting on it, at least up until the conference in Chicago. Now, he never indicated he doubted the integrity

or the business standards of the plaintiff. There was
757 nothing in the contract which indicated that there was anything unusual about this method of distributing shrimp.

Now, they say, "Will you give us a guarantee from Nacional Financiera?"

What is Nacional Financiera?

The evidence is clear that Nacional Financiera is the principal stockholder owning 80 per cent of the stock of the plaintiff, the largest creditor. The defendant submitted witnesses who said time after time Nacional Financiera dominated the policy of the plaintiff. If that is so, and the plaintiff is only the instrumentality of the Mexican banking agency, what was the need for this guarantee?

It was a spurious excuse. It was not made in good faith. The real reason we finally discovered yesterday. We found the right reason yesterday.

After considerable prodding and evasion on the part of one of the witnesses, one of the partners, of the defendant firm, we found that for some time prior to the crucial period, that is September and October, there had been formed a corporation engaged in the business of buying and selling shrimp by the name of Prawns. The stock-
holders were young Appelbaum who testified here that
758 he owned 51 per cent of the stock. I tried to inquire of the defendant, Mr. Appelbaum, Sr., as to his connection with the company. I asked him, I said, "Did you lend the sum of approximately—" or words to that effect—"$209,000 out of Penguin Frozen Foods to this firm, this corporation, Prawns, Inc.?"

He said, "No."

He did not explain. He did not say, "Well, it might have been a large sum, but I don't remember." He said, "No."

Upon further questioning, he said, "Well, maybe some money."

And then I asked him again, and he said he could not recall.

Now, it is inconceivable in my opinion that a sum of such magnitude for a purpose of that type would not be recalled by the principal owner of that business, the defendant. It is also a strange coincidence, ladies and gentlemen, and I think this solves the problem, that is lurking in the background, as the testimony of Mr. Olsen indicates the

following loans were made by the defendant firm to Prawns totaling $209,000 during the period from September to November, 1953. The figures are as follows: Septem-
759 ber, 1953, $40,946.85. This, mind you, is from the defendant's own books. In October, 1953, $141,000.

Now, on October 14, 1953, the defendant told Mr. Collenburg ~~on the telephone~~ that the amount of credit to which the plaintiff was entitled, or words to that effect, was $140,000.

Now, that begins to look as though the moneys that the plaintiff was entitled to recover from the defendant was used to finance a new business. But, more reprehensible, perhaps, than that, or equally so, is the fact that this was in direct violation of the contract. Certainly the spirit of the contract, that is, that provided that the defendant would buy all his shrimp from the plaintiff.

And, here is a competing corporation in which his son owned 51 per cent of the stock. That does not smack of good faith at all.

In addition, in November, 1953, the books of the defendant clearly indicate that an additional sum of $67,594.79 was advanced to Prawns by the defendant. That makes a grand total of $209,541.64, which is within a few dollars of the total principal amount that we claim is owed by the defendant.

760 Now, the defendant thought perhaps—may be he got advice on this—but he thought by resorting to subterfuge and technicalities he could defeat this claim. He perhaps thought he was very safe because the plaintiff had made such commitments that it would not have to perform.

What further is the fact on that?

The evidence shows that Reno, the plaintiff, never entered into a contract with Crest or with E. A.. There have been many documents introduced in this case by the defendant, but there is not a scintilla of evidence to show that the plaintiff actually made any commitment to anybody for the sale of shrimp in the United States. As a matter of fact, there was not even a contract, although beginning October 23, as the evidence will show, the plaintiff did make shipments, but that was after the contract was lawfully terminated, as it had the right to do, and as the Court will direct you. A party will not be put in a position of having to furnish merchandise to a debtor who does not make good on his part of the contract. He cannot

have his cake and eat it, too. The law is sound, and the court will direct you, I am sure, along those lines.

761 So I say to you that the defendant, Mr. Appelbaum, Senior, was less than frank in candor with you when he was evasive in telling you about the connection between Prawns and the defendant firm.

Now, they will make a great deal to do of the Crest and E.A., set-up but an analysis of the fact in connection with that transaction will clearly show that whatever the plaintiff did in connection with that matter was not inconsistent as going on another year. After all, all that was involved was the period from October, 1953 to August, 1954. Now, the Crest set-up involved many people, involved the whole West Coast, not the whole West Coast but a third of the West Coast production. That was a long ranged project. This matter of a few months more with the plaintiff, did not make any material difference as far as this plan that had been evolved in the best interest of all the constituent members of this E.A., association.

There was no intention, as I said before, to completely exclude the plaintiff. There were many discussions in good faith, I am sure, by Mr. Appelbaum, and I am certain by the plaintiff.

Now, Mr. Willis came into this picture thinking that the contract between the plaintiff and the defendant

762 was properly cancelled and naturally when 20 per cent of the production that he had counted on had disappeared he thought it was a catastrophe; but the other parties were not as concerned as that. It was still possible to go on for this one season that was left with the plaintiff.

Now, Mr. Willis, as early as September 11th wrote a letter which is introduced in evidence by the defendant, dated September 11, 1953. He said, "It looks like we won't be able to have the plaintiff in the picture and that the contract will run on another year."

He said, "Well, frankly, I am quite concerned—" We did not introduce this into evidence, the derogatory remarks here about the defendant. We did not introduce that letter. This is by a third party. They have brought this thing into evidence and you can look at it, but the part I am calling your attention to is the following paragraph:

"Now, frankly, I am quite concerned and disturbed to find that there is a possibility the contract between Refrig-

eradora and Penguin might extend another year. By that time it is fair to assume that the plaintiff had gotten advice concerning the validity of the extension agreement and certainly by the time of the Chicago Conference
763 that possibility was a reality."

It is apparent from the evidence that the plaintiff then decided that the only way out of this situation was to adhere to this contract; and, as the Court will direct you, even though a party in advance of the due date of performance under contract decides to wrongfully terminate it, it can thereafter reconsider the situation and the parties certainly in a case such as this where the defendant insists that both parties go on with it and acquiesce with it, it is not a breach of contract and the Court will so direct you.

There are many cases in the law where parties have intentions, and intentions that may not be proper until they materialize into an actual act where someone is harmed there is no unlawful conduct on the part of the individual who may have had an improper intention.

Now, what we have here and what you will hear today will be technical arguments on the part of the defendant's attorney. They will resort to all kinds of strange instructions. He will tell you that the defendant didn't owe the plaintiff any money at the time the wires were sent in October. He will resort to an argument, I am sure, that he is only obligated to pay when each carload was
764 sold out completely. This flies directly in the face of the contract which you have a right to examine and look at it in the jury room. It is a ridiculous construction. According to that construction all the defendant would have to do would be to hold out a few pounds of shrimp on every car to defeat entirely the clear intention expressed in the contract itself.

I am sure that you ladies and gentlemen of the jury are interested in honest and highly moral business dealings; that you will not condone an undesirable business practice that allows a debtor to employ and pay the just payment of his obligation. This was a terrific blow to the plaintiff to have such a large amount of money outstanding. It is fair to presume that it had to pay interest and for that reason the law to make the plaintiff hold requires that it be entitled to interest for the period of time that this money was wrongfully withheld.

As I have said at the beginning, plaintiff and its officials, who you saw take the stand here, at all times have acted in good faith, consistent with the highest standards of business morality and I am confident that after you have examined the evidence in this case and studied the instructions and the documents, you will render a just
verdict whereby the plaintiff will be duly compensated
765 for the clear amount that is owing him.

There is one other item that I think requires very little discussion and that is the matter of the defendant's claim for damages. Of course, you do not have to consider the matter of damages unless you first answer the second interrogatory in favor of the defendant.

Now, the evidence on damages is very, very weak. The burden of proof, as the Court will direct you, will be on the defendant to prove that he was actually harmed to the extent of the profits that he would have earned had the contract been adhered to by both parties.

Now, what are the facts on that? The facts are that the defendant was able to get other shrimp. If anything, the supply was larger in quantity and volume. They made no offer to give the plaintiff credits for any profits they might have made out of that. They use as the basis of damages the United States Fishery and Wild Life Bureau figures, although admitting on cross-examination that they hardly paid any attention to these quotations when they were selling Reno shrimp during the preceding season.

Mr. Appelbaum, Junior, Robert Appelbaum, apparently is in charge of the books of the Company and has had
accounting training and when asked about what the
766 profits were of the 1954 year, said that they were just
a few thousand. I think the figure finally came out from Robert Appelbaum of $4,400.00. We find, as you will recall, the stipulation read by the Court regarding the income tax return of the defendant for the year 1954, which was only filed a few months ago, yet this account, and who was in charge of the books would have us believe, that all they made was a few thousand dollars when, as the return shows and as the stipulation indicates, it was approximately $33,000.00, including $26,000.00 to the three partners who were active in the business. I say to you that that is not the degree of candor and frankness which this jury is entitled to. I think their entire claim of damages is merely speculative. They have not laid the proper foundation and I submit to you that it is as unsound

as many of their other contentions that they have made in this case and I, therefore, submit to you that they have not shown exactly, even if they were entitled to damages, which I insist they are not, if there were losses the evidence does not disclose that the losses were due to anything which resulted from this alleged breach of contract that may have been for other reasons such as the fact that the defendant engaged in buying shrimp on his own. But
767 there was some evidence there was a break in the market. But be that as it may the defendant has the burden of showing exactly what his damages are. He has the books and records in his possession and I submit that they have utterly failed to show any damages.

I appreciate in closing the intention and concentration of effort that each and everyone of you members of the jury have indicated during the trial to my argument. Thank you very much.

The Court: We will take a recess for 10 minutes.

(A recess taken.)

The Court: Defendant's answering argument to the main argument in support of his counter-claim.

Opening Argument on Behalf of the Defendant.

By Mr. Clayton:

May it please your Honor.

The Court: Mr. Clayton.

Mr. Clayton: Ladies and gentlemen of the jury, and counsel for the plaintiff:

You have just heard Mr. Kohn in his opening argument give his reasons why he considered that the plaintiff should recover and that the defendant was not entitled to any damages under his counter-claim. I will attempt to answer that briefly and will also call your attention to
768 the evidence which we think clearly shows that the plaintiff is not entitled to recover under the contracts because it breached its contract with the defendant and the defendant, as a result of that breach, sustained damages which we contend the evidence conclusively shows.

Now, with respect to the contracts there is no question that a contract was entered into in October of 1950. The terms of which had been read to you ladies and gentlemen and by the terms of that agreement the plaintiff, Reno, was to sell its shrimp to the defendant for the

distribution here in the United States and in Canada. The defendant agreed, according to the terms of that original 1950 contract that payment would be made according to certain terms set forth in that contract. Counsel would have you believe that those terms still continued up to and until February 25, 1953 when the plaintiff attempted to breach the contract by sending the wire which he read to you and which you have read in evidence.

Now, let us see whether that is correct. According to the terms and this original 1950 agreement, the method of paying for this shipment was by letter of credit. That is that the defendant was financing the shipment and
769 the defendant financing the shipment and each month there would be reports given because the money had been advanced, and there would be adjustments made as the result of that. And simultaneously with these reports whatever the difference was between the amount that had been sent by the letter of credit and the actual amount received from the sale of these shrimp would be adjusted and payment would accompany them. There is no dispute as to that.

Then we come down to 1952. There is an extension of the original contract with certain exceptions and with the extension the defendant is no longer financing. He is no longer required to send letters of credit and the reason that there is a difference is that when the defendant was financing the shipment, the defendant was receiving a commission of 7 per cent. Under the extension agreement it provided that that if the defendant did not finance, he was to receive a 5 per cent commission and you heard the testimony of Mr. Pinson. You heard the testimony from Mr. Fraustro. You heard the testimony from Mr. Appelbaum, the defendant, that the giving of this extension agreement his commission was 5 per cent, which meant that he was not financing it. He wasn't sending letters of credit. He wasn't required to submit each month with each report any moneys, because he would sell
770 the entire car and when the car was completely sold on a cash basis, he would remit the amount which he had received less his 5 per cent commission.

Now, that is nothing strange about that. That is an ordinary contract which each of you ladies and gentlemen, I am certain, can appreciate the terms of.

Now, they argue that now because of things done by them that the defendant breached his contract because

he, the defendant, did not send money simultaneous with any reports. He never heard of that before, until the plaintiff had breached its contract.

Let us take the testimony of Mr. Pinson, the plaintiff himself. Didn't he tell you, not once but many times, that from the time the extension agreement was entered into in July, 1952, up to and until the time that they, the plaintiffs sent this telegram stating that they were cancelling out the defendant's contract of August 15, 1953, that the practice had been that the defendant would remit for the cars when they were completely sold out. That is his testimony and that was the practice and didn't Mr. Appelbaum tell you that that was the practice? That was the way they were doing business, and certainly counsel told you that you would hear strange arguments by counsel for the defendant. I hope that when I call your
771 attention to the plain wording of the contract and when I call your attention to the practice that they were operating on, the plaintiff and the defendant, and ask you to consider that that you won't consider that a strange argument but just a mere re-statement of the facts as they existed and as these two parties were doing business at that time.

Now, I think you will be called upon to determine whether or not the plaintiff breached his contract. Now, let us see whether or not they breached the contract. It was no contention that when the defendant was financing the shipment, sending letters of credit, that he did not simultaneously with each report, remit whatever the difference was. You didn't hear one scintilla of testimony from Mr. Pinson, from Mr. Olsen, the accountant, the C. P. A., or from Mr. Fraustro to the effect that during that 1950 agreement that the defendant did not live up to the terms of that contract and remit simultaneously with those reports whatever money was due.

772 Then, when they get the extension they are not operating on the same basis. They are now, as I have just told you, the shrimp is being financed by the plaintiff, the defendant does not have to send any letter of credit. The defendant pays for the car when it is completely sold. Now, could the defendant have paid for the cars before they are completely sold? From the testimony that you heard those cars were sent on a trust receipt, one car, one trust receipt. When the cars were completely sold he paid for it, and that is what he was doing.

Now, they tell you that it is no dispute that there were 31 to 38 cars, meaning eight cars that had been sent, and the defendant refused to pay for them. We say to you, ladies and gentlemen that the defendant at no time refused to pay the plaintiff any money when it was due and owing. You, I am certain, are familiar with every day business practices. You can do business with a firm on a 90-day basis, and you can't say that no one can say that you are not living up to your obligation when you don't pay until the 90-day period expires. That is your agreement. If you are doing business on a 30-day basis, I don't owe you any money and you don't owe the concern that you are
773 doing business with any money until the 30 days expires, and then you fail to pay. If you fail to pay, then you are not living up to your agreement. But any time within the 28 to 29 days when you are operating on a 30-day basis, you have not breached your contract and they have no right to demand payment until the 30th day. Well, they have no right to demand any payment for those eight cars that had been sent under the agreement that they had been operating on since July 15, 1952, until those cars were completely sold. Did they tell you or did you hear from the testimony of any person, from Mr. Olsen, who went to the office of the defendant, who had access to all of their books and records, that any one of those cars had been sold out before the plaintiff breached their contract? He told you, and the evidence is, the reports so show, that they were not sold out. And, let us see. Reno had its auditors there. You never heard anything to the effect that they had sold cars and had not paid for them. And was that, as counsel says, an unusual way of doing business? There is in evidence the report that Crest and their method of operating, and if you will look at that report, I think it will show that as and of the time that that report was given it was approximately eight cars
774 that were being sold out. That is no practice that is just used by the defendant.

775 I think this has been introduced as Defendant's Exhibit 13. You will have a right to examine it.

Now, this isn't the business dealings of the defendant that counsel said that he is trying to figure out some subterfuge to keep from buying. This is the Crest Company, this company that has been organized that is doing business now with Reno, the plaintiff—that was organized, we

contend, for the sole and specific purpose of putting the defendant out of business.

And, if you will look across here, you will see all of those cars for those months that were being sold out, and not completely sold out. So, it is nothing unusual for sales to be made out cars. Didn't Mr. Olsen state to you that the checking of the books, in doing that, he found that the sales from cars, that sometimes it would be one sale of the entire car, but the sales sometimes would run up to as many as twenty before the car would be completely sold out. He told you that. He is their C. P. A. He examined our books and records. He had access to all of the figures. He told you that the defendant made accessible to him their entire books and records.

So, they weren't concealing, nor attempting to conceal anything.

776 Now, when it comes to the defendant's living up to their end of the bargain, I think that you must agree that the evidence, not—but conclusively shows that they lived up to their end of the bargain.

Let us get back to the beginning of the dealings, and see whether or not the defendant breached any part of their contract or who, in fact, breached their part.

You heard the time that the defendant, Mr. Appelbaum, first met Mr. Pinson. At that time Mr. Appelbaum was a director of Goldblatt's. The testimony showed that he had been a director for approximately 20 or 25 years. He is not a fly-by-night individual. He is a responsible businessman in his dealings. You know, each of you, I am certain, about Goldblatt's and its operation, so he must be a substantial citizen to have been a director for 25 years. He was in that capacity when Mr. Pinson met him.

Mr. Pinson told him that, "If you are interested in acquiring a contract for the distribution of our Reno shrimp, we will require your advance of $150,000."

Mr. Appelbaum said that he didn't advance it. He told them he was interested, but he would not advance that much money.

Now, Mr. Pinson is the general manager of Reno.

777 Picture the whole set-up. He has talked to Mr. Appelbaum. He does not get the advance, but, Mr. Appelbaum gets the contract to distribute as the sole distributor for Reno for shrimp here in the United States and Canada. You know by this time from the testimony that has been given, even by Mr. Pinson's own admission, that he had

opposed from the inception the contract that Mr. Appelbaum had. You know by his own admission that he told you from the stand that when the extension agreement was entered into, he opposed it before the board of directors of Reno, so you don't find him coming in here as counsel for the plaintiff would have you believe as just as an employee of the plaintiff, and not one who has not just recently, but ever since the contract has been in existence, been opposed to it in trying to find some way by which it could be cancelled and terminated.

So what do we find?

Mr. Appelbaum, as I said, was doing business with him. There was no contention that when he was furnishing letters of credit and the reports were sent to him that the payments were not made exactly as they stated they should be under this original contract.

Now, when we get the 1952 extension, I have told
778 you that the method of financing changed. If the plaintiffs were financing it, the defendant only got a five per cent commission, but the agreement now is, and the practice was, according to Mr. Pinson himself, that payment would be made when the cars were completely sold. That is important.

I will call your attention to it a little later.

Now, that is the agreement that they are working under. That is the practice that is involved.

Now, on February 25th, nothing having been done, as you recall, by the defendant that would cause the plaintiff to want to terminate the contract, because as he told you, when things got so bad that he made a trip down to Mexico City and he saw Mr. Alcalde and Mr. Saenz. They told him, "You have done a good job for the company, but Mr. Pinson is opposed to you and the contract, and there has been a change in the administration of the Nacional Financiera. Mr. Pinson now has the ear of the board of directors, and they have decided to go along with him, and he has decided that your contract must be terminated."

So, as Counsel read to you, and I won't re-read it, except to call your attention to this statement that on
779 February 25, 1953, no contention is made now that you are not sending the money along with any reports, no such contention made that you are not remitting for the cars when they are completely sold out, as you are supposed to do, but the mere statement that, "You will please take note that said contract in accordance to its

clauses will thus end on August 15, 1953." It is signed by the plaintiff.

Now, here is a man, who, as you must know, is the sole distributor of shrimp in the United States—to be that it requires an organization, it requires an investment of a lot of capital. He must be concerned now. This is in February. The present season will soon end. They tell him now that, "We are notifying in February that on August 15th, your contract is through."

He must be astonished. He has this investment. He has his commitments to customers, and Counsel here tells you that there was no contract between the defendant and customers. You know as well as I do in every day business experiences one who has a standing in the business world like the defendant doesn't have to have a written contract. A contract in writing, ladies and gentlemen, is no more than the word of the man that signs the contract.

780 If an individual does not intend to go through with a contract, the mere fact that it is in writing does not make it any more binding.

Isn't that borne out by the plaintiff in this case? The fact that they had a contract and extension running through 1954, and they didn't decide that because "We have that in writing, that we are going to live up to it."

They sent him this telegram, well, "You are through on August 15, 1953."

So, Mr. Appelbaum does not have to have any written contract with any customers that he has agreed to furnish them Reno shrimp. He has given them his word, and he wants to live up to it, because he is a businessman whose word means something in the community and with business people that he has dealings with. Then he, in turn, is disturbed about it. He sends the wire, Plaintiff's Exhibit 5, that they introduced in evidence.

Let us see if this is any subterfuge to try to withhold any payment. He is paying, according to the record here, when the cars are completely sold. This is dated February 26th, the very next day. He says, (reading):

"In reference to your telegram per supplemental agreement signed July 22, 1952, contract is not subject to cancellation until 1954."

781 Now, you must decide whether or not the plaintiff breached the contract.

Now, Counsel here tells you that if a person says that they are going to breach that contract and it is to take

effect in the future, that is known as an anticipatory breach. In other words, I am telling you now that I anticipate terminating our relations on August 15th.

He says that if the party then decides that they are going to change their mind and go through with the contract, that the original party is also bound by it, unless he has changed his position.

Now, has the plaintiff shown you one bit of evidence, or have they introduced into this record any document whereby the plaintiffs change or recall the message that was given to the defendant in this February 25th telegram before August 15, 1953? You have not heard it. Mr. Pinson did not tell you. Did Mr. Pinson tell you that based upon their advice that they received from the Mexican attorney, and based upon his belief that this contract was cancelled, they proceeded to organize E. A. He was a member and director of that, and Crest. For what? To do the very thing that they had given a contract to Mr. Appelbaum to do, to distribute the shrimp of Reno
782 here in the United States. So, they considered that they had breached or had terminated the contract.

True, they did not have any right to do it, and Mr. Robert Appelbaum told you that Mr. Alcalde told him that the contracts don't mean anything in Mexico. That is not denied.

Now, then you have the—not just this one message that is given to the defendant, but you have in response to the telegram that Mr. Appelbaum sent a letter, that when he finally went in Mexico to try to iron out the thing out, because he had commitments to these customers to supply them with Reno shrimp, and he had a conversation with Mr. Alcalde.

Mr. Alcalde, according to what he told you, stated that, "You have done a good job for the company, but Mr. Pinson has the ear of the board of directors," or words to that effect. "I would suggest you go down and talk with him."

So, he leaves Mexico City and he goes to Mazatlan, down to the plant of Reno.

783 And then he confers with Mr. Pinson. Mr. Pinson, you heard what Mr. Appelbaum told you he told him, but when he is ready to go, he hands him the letter in person, which, of course, reiterates their contention:

"Your contract we consider at an end as of August 15."

That isn't a repudiation in saying, "We thought we

would cancel it on August 15, when we sent the letter of February 25, but we are now changing our mind." They are again telling you, "You no longer have a good contract."

What does he do?

He then communicates with the plaintiffs again and tells them he considers his contract a valid contract and in existence.

But, what does he get in response to that? He gets another wire in which they again tell him that they are not going to be bound by it.

Then he on August 20, after the August 15 deadline—that is when they give it to him—up to that time there is no statement by any party representing the plaintiffs that they are not going to go through with this termination that they said would take place on August 15. He then
784 said on August 20, the defendant, when he wired them a telegram marked plaintiff's Exhibit 8:

(Reading) "Regarding your telegram received August 20, conclusively proves your intention to wash me out of the picture in violation of your contract notwithstanding my great service and contribution."

Now, who violated or who breached whose contract?

Can they have the temerity to stand before you ladies and gentlemen and say that they did not breach the contract?

Can they honestly stand here and tell you that the defendant breached his contract, and that the defendant should respond the damages, when in the face of all of these documents, and many others which have been read to you, I am not going to burden you or take up your time by again reading—they conclusively show they breached the contract on August 15.

Now, what happened?

The defendant still knowing that he has these commitments sent other wires, telling them to send an authorized representative to Chicago. "I was in Mexico for two weeks, and didn't get anything but the run-around" in the language of the street, and the telegrams so show.
785 He talked to Mr. Pinson, and to show you the shrewdness of Mr. Pinson, when he first sees Mr. Appelbaum in Mexico City after he handed him the letter in Mazatlan, he tells Mr. Appelbaum to give him his idea of the market and so forth.

So, pursuant to that, Mr. Appelbaum writes him a let-

ter from the Balmer, I think, Hotel, in which he gives him his opinion of the market.

But, he, Mr. Pinson, had told the Board of Directors, when he read the letter to them that, "This is the reply which Mr. Appelbaum gave me to the letter which I gave him in Mazatlan.

Didn't Mr. Appelbaum tell you that? And, don't the exhibits which have been introduced in evidence here bear out that contention?

A response, when he sees Mr. Saenz, Mr. Saenz tells him, "Man, what is wrong? What are you doing to us?"

"What do you mean?"

"You were supposed to respond to the letter of July 17, which was given to you by Mr. Pinson, in Mazatlan and this is what you replied."

What did he find that he does in response to that? He immediately writes and says that "that letter that I
786 sent you was not in response to the letter given me by Mr. Pinson on July 17, but that was in response to something else."

Now, in response to that letter, he gives him his reply. So that now, when they talk about dishonesty in business dealings, and they want the high standards kept up, does that reflect the high standards that you would want in a person that you are doing business with?

Doesn't it conclusively show that he from the inception and up to that time was still putting the defendant in a bad light to the Board by telling him, the defendant, one thing, and representing to the Board something else?

What do we find as we go along?

When he gets back here, and he has told them, as I said, to send a representative, because, "I got no place in Mexico," they send Mr. Fraustro.

You heard him, and you saw him.

With respect to the breach, I am asking you up to this time has the defendant done anything to breach that contract? Hasn't since the February 25 breach been on the part of the plaintiffs, and have they up to this time stated they were going to recall that order of termination of contract?

787 Didn't Mr. Willis tell you when he came to Chicago on September 13, long after August 15, that he came here with the idea in mind that the contract between Reno and the defendant had been terminated? And, when he found out to his dismay, when talking to Mr. Collenburg in the office of Mr. Appelbaum that that was a valid contract, he

said it was "catastrophic to think that you have to go along for another year with the defendant."

Now, does that tend to show that they wanted to recall the breach?

Certainly not. I am certain that the Judge will instruct you that it is true that if one says prior to a certain date that I intend to cancel a contract on a given date, if that person rescinds that in good faith, prior to that date, and the person to whom this statement has been made has not changed his position, he can withdraw it and the contract will remain in force and effect.

But, they said it was going to be terminated August 15, 1953, and in September, around the 18th or 20th, when Mr. Willis comes here, he thinks it is still terminated. He told you that. Didn't Mr. Fraustro also tell you that?

Didn't all the exhibits in evidence conclusively show the same thing?

788 So, when they are in the office and this is what they tell you that the defendant is going to give you some strange argument. I am going to ask you just to put yourself in Mr. Appelbaum's position. He is a businessman trying to do business. He is trying to satisfy his customers. He is trying to maintain the same reputation in the business field he has enjoyed up till that time.

Now, they come in, they don't come in there to tell him, "We are going to withdraw that statement cancelling it." Mr. Fraustro comes in at that time—our contention is and it is conceded that he may not be able to speak English, but I say that the plaintiff didn't send their comptroller here without an interpreter if they did not know he understood and could speak English sufficiently to represent them in contract negotiations. You and I know that.

He went into Mr. Appelbaum's office, being able to understand and speak English. But, when he comes into Court, he is going to cause you, ladies and gentlemen, to believe that he cannot understand, so he has to have an interpreter.

Why is it?

789 Because there are many things that he possibly does not want brought out, and it is easy to conceal by not being able to understand a language. That is understandable.

But, he did not ask for any interpreter. The brother that is studying medicine here went along the second day. The brother was not there at the third meeting. The brother was not there at the fourth meeting, nor was he

at the first. And yet, at the third and fourth meetings, that was where they were discussing more than at any other time what arrangements would be made with the defendant, and there was no interpreter there then.

What do we find?

Not only did they come in here and not say that, "We are going to withdraw that statement that we were going to cancel your contract", but they came in here with the idea of getting Mr. Appelbaum out of the picture altogether. He told you that. They offered him $20,000.00 or $25,000.00.

They tell you, counsel for the plaintiffs, that they did not intend to get him out of the picture. They were offering him a sub-brokerage arrangement with Crest.

Now, let us see. How would you figure this out? Would you call it fair. Would you want to be dealt with accordingly in your business relations and dealings with
790 people?

Here you have a contract whereby you are the sole distributor to receive 5 per cent. You are complying with the terms of your agreement. You are remitting for cars when they ae completely sold out. There is no complaint being made. You receive a telegram stating you are going to be cancelled out on August 15. After August 15 someone walks in to you and says, "Listen, Mr. Collenburg has told us we should not have cancelled your contract; that you have another year to run".

Not that, "We want to live up to it", as the defendant had insisted that they do, but, "We want you out of the picture. Here is $20,000.00." And he won't take that.

Didn't the testimony given by Mr. Appelbaum say that in the course of the discussion, and didn't Mr. Collenburg tell you this, and he is the attorney representing Nacional Financiera, and also the plaintiffs in this case as their New York representative. Didn't he tell you while he was on the stand during those discussions that Mr. Appelbaum said that "this is just before the beginning of a new season. Our organization is all set up. I have gone to great expense. Any offer that you make that would com-
791 pensate me comparable to the offer that I had, I am willing to go along. I don't want to hurt Reno, but by the same token, don't hurt me. I have money invested in there."

Then they come up and say, "What will you take?" He proceeded to tell them that under his agreement he would

receive in excess of $100,000.00. They had offered him 20, they had offered him 25. They offered him a subbrokerage of a commission working under Crest, but limited territory. They won't give him all the customers that he had developed, and he has had commitments too, and when he makes a counter-proposal where he could possibly equal the contract that he had, they turned it down.

They say, though, that, "We will go away and communicate with Mexico and let you know."

That afternoon, they walked in, and this is what Mr. Collenburg said, and in only a few minutes:

"The best we could do is $40,000.00, to wash you out of the picture."

They did not say that we want to go on through with the contract.

He said, "I won't take it."

This is what they tell you, that they reinstated a contract that had been terminated since August 15.

792 Now, if the contract had been terminated and was terminated on August 15, you should have some understanding as to what you are going to do in the future.

The only thing that happened at that meeting, and I think I will quote the words of Mr. Collenburg. He says, that "As we got up to leave after Mr. Appelbaum had turned down the $40,000.00 offer and be washed out", Mr. Collenburg, "I said, 'You think you have a good contact with Reno for another year? Are you able to perform? You want us to perform, do you?' "

Quoting Mr. Appelbaum, "Yes, that's it."

Is that a contract?

Let me ask you, is that a contract?

And at that same meeting, doesn't Mr. Fraustro, who has been at the four conferences with Mr. Appelbaum, say that he has been talking about guarantee?

Now, counsel tells you that, oh, Mr. Appelbaum is trying to impose a provision in a contract which they decide to dictate that is not in the contract. There is no contention, nothing with respect to guarantee.

We find that Mr. Fraustro in a discussion with him had had something said about guaranteeing performance if they would go on through.

Let me ask you. He says he has not asked any
793 guarantee before. I will go back to whether it was in the contract.

If you were doing business with me—and they say he

had not asked it over the two or three year period he had been doing business with them, under this old contract, the first one, the 1950 agreement, Mr. Appelbaum was remitting the money simultaneously with the reports. He was financing it. He was getting 7 per cent.

Let us see whether he is the type of individual that is going to try to get out of something. He loans them at that time under the old agreement, according to the specification, in it, $68,000.00—$68,000.00.

794 He did require though Nacional Financiera to guarantee it.

Why?

Because he evidently knew that he had no way of collecting the $68,000, if they decided not to pay him. He could not go down to Mexico to collect it.

And then, he from time to time advanced, according to Mr. Olsen, who testified that the books show, and according to Mr. Pinson, he had to admit, although he has no desire that any contract between the defendant and the plaintiff continue to exist, he is not going to go out of his way to paint Mr. Appelbaum in a favorable light to you ladies and gentlemen, he told you that large sums of money weer advanced from the defendant to the plaintiff from time to time, and no interest charged. It was solely as a loan. There wasn't any evidence of any interest charged.

Isn't that the picture of a businessman who is trying to lean over backwards to get along with one of the people that he is doing business with in maintaining his business relations and his contract with that?

And then, as I said, Counsel says up to that time he never asked for a guarantee. This was a way and means whereby he wanted to get out of the contract. Mr. Appelbaum had breached it.

795 I would just ask either one of you, if you were doing business with a concern, whether it was a domestic or a foreign corporation, here, after three years, without any warning they tell you, "We are cancelling out the contract," and you know they don't have any right to cancel it; you know they should know it, because it is in writing. You must know this, that you are doing business with a person that is not as reliable and as responsible as you thought they were.

And you know that all down during these months they have been telling you that, "We are still going to cancel it," and then when they find out that their own attorneys

advise them that, "You were wrong in cancelling it, and the cancellation was a breach," before you start doing business with them again, don't you want some assurance that they are going to live up to what they say and they promise?

That is all that he asked.

Let us assume for the purpose of argument that they had the original contract. You know and I know that there was nothing to compel them to ship any shrimp.

Let us go back. They say when they sent this wire telling him that the board of directors had decided that they were going to live up to the extension agreement
796 and that they were going to be bound by it, this is what Plaintiff's Exhibit 12 is. This is a letter, but it contains a telegram which was sent to him after Mr. Fraustro had returned to Mexico. (Reading)

"This is to advise you that board of directors of this company at meeting held yesterday confirmed the extension letter July, 1952. Therefore contract remains in force and vigor and directors hereby request payment Bank America on or before Wednesday, October 17, 1953."

Now, aren't they imposing a condition that is not called for in the contract?

The contract that, the extension agreement and the clauses under that extension agreement is that the cars, the remittances are made when the car is completely sold out. As I said Mr. Pinson admitted that. There is no doubt about that.

Why, when they are attempting to reinstate some contract, would they then come up and say, "We demand payment to Bank of America before Wednesday, October 17 of all sums due as a result of your sales to date our shipment"?

797 Now, they are not due until the cars have been completely sold, and under the evidence in this case, not one of those eight cars had been sold, and as I have just shown you by comparing their method of doing business with that of Crest, that they had approximately a number of cars that were not sold out at any one given period.

798 Then they say "Anticipate shipping first car around October 9", and they request of Mr. Appelbaum open up a letter of credit for them. In other words they say, "We are going to ship you a car, since we are going to go along with the terms of the extension agreement, but we

want you to open up a letter of credit that this car will be shipped October 9." That is what they said.

Now, you find that the next thing that happens—that is on October 3,—on October 6 the defendant sends them a letter, a wire, telling them he is glad to know that you are accepting your responsibilities. But he wants to know whether or not since you are now asking me for a letter of credit you are going back to this original agreement of whether you are still going to be bound by the extension. If you are going to be bound by the extension agreement which you said you are if I pay for the cars as I sell them out. If you go back to the original agreement then I am financing. I am giving you letters of credit but I am entitled to 7 per cent commission instead of the 5. In their telegram of October 3, they didn't tell him, "I don't think that when you send a letter of credit that we are going to give you a 7 per cent commission", so wouldn't you as a good business man want to know on what basis are we going to deal? Are you going back to original old agreement? You said you are going along with the extension. Then if you are going along with the extension, I am going to get 5 per cent.

Then, he, not as counsel would have you believe, tried to get out of something, tells them. He does this: He then sends the wire of October 6 that I have just told you and he sends not one but two letters of credit which was introduced into evidence, each for $30,000.00. Does that appear to be the actions of an individual that is trying to get out of something, that is trying to breach some contract? He is going, as I said, overboard. But they told him they anticipated breaching it. They breached it on August 15. Now they say that we are going to go back to the extension agreement without specifying or spelling out to him the terms that he is going to operate on. But could they lose? Could they lose on one car when they got two letters of credit totalling $60,000.00? You know they couldn't. They were not taking any chance. But did they send the cars? Now, that is the thing that you must bear in mind.

If they intended to go through with this extension agreement or with any agreement, as they say in this letter, that they are going to send a car on October 9, why wasn't the car sent before October 20, when they say, "You didn't send that money so we will stop everything." The car was not sent on October 9 and the

evidence is that it never was sent, but the letter of credit had been sent and it was paid for. If one letter of credit didn't cover it there were two totalling $60,000.00. They couldn't lose anything.

Now, when you are called upon to ask whether or not the defendant breached the contract or whether or not the plaintiff breached the contract, I think the evidence up to this point conclusively shows that the plaintiff did breach the contract.

Then, they will tell you without my going into all of the other documents that this is plaintiff's own case, that they submit to you and tell you that the defendant has breached the contract. And I say, not any strange argument, but just a fair and impartial reading and interpretation of those documents and the testimony that you have heard, submit to you and tell you that the defendant has breached their contract to the defendant. I say their actions conclusively show that they never intended to go through with that agreement.

I suppose they wanted the defendant to send the money down in Mexico. No shipment or anything else had been forthcoming. At least they didn't need to take the
801 chance where a letter of credit had been sent and send the one car that they promised. And as I say, and I can't overemphasize and it is no strange argument, according to the practice, they admitted when the car was completely sold on October 20th, when they finally terminated, they say, "We are through with having any dealings with you". No, not one of those 8 cars had been completely sold and they were not entitled to any money. But, for the future dealings if they wanted to go on and adjust it, the defendant executed two letters of credit and sent, based upon their statement that they are going to send one car and they don't communicate with him when he wants to know under what basis are we going to do business in the future. They do not comply with any request that he makes there. They just say, "Cancel him out. We are through with you." Then they come into this Court and tell you ladies and gentlemen now give us a judgment for damages for the defendant, or to say he owes us money.

Now, if he didn't owe any money to them, if the practice was as I have stated, as Mr. Pinson said it was, that he remitted when the cars were completely sold, that when they demanded the money be paid to the Bank of Amer-

ica or First National Bank, then they would do just
802 what a business concern would do if they sold you something to be paid for 90 days from date. And two days later they say, "Give me my money." They have no right to do it. They didn't have any right to ask it.

Now, counsel may tell you that there is nothing in the contract about paying for cars sold, as they were completely sold out. Now, if there is nothing in the contract about that then the parties have a right under that extension agreement by that practice to decide upon a method of payment and that method was decided upon, agreed to by the plaintiff, Mr. Pinson. He didn't deny it that had been the practice and there has been no complaint about it.

803 Then, before they would be justified in demanding that the defendant do anything to the contrary they should have served him with a notice telling him that beginning on a certain date in the future they are going to require, as to all future shipments, you pay for them when you get them. They didn't do it. In other words, if I am renting an apartment from either one of you, and let us go so far as to say that by the terms of that lease it provides the payment of the rent shall be on the first day of each and every month. But yet, by practice, because I might be working for a concern that doesn't, and I don't get my check on the first, I don't get it on the fifth. I do not pay my rent until the tenth. I will go along for eight or nine months. I don't pay my rent until the tenth of each month. You accept, even though the contract or the lease says that it should be paid on the first. You know as well as I do that you can modify an agreement by the acts of the parties. So even if the contract says something, as Counsel would have you believe, and I say this extension agreement doesn't, it has been modified by the acts of the parties and it was accepted by the plaintiff and acted upon by the both parties. They have no right to demand anything.

804 Let us see what now. We say that we lived up to our agreement. The plaintiffs breached it. They had no right to do it, and we have been damaged. Let us see whether that is correct.

The testimony is that, in an attempt to show that Mr. Appelbaum had developed a large business. He told you that he had good customers in Philadelphia, Milwaukee, New York, and other places, and by his books and records

you can see that the volume of business was large. He was the sole distributor of Reno's shrimp. The people relied upon him, furnishing this particular kind of shrimp. And you know now from the testimony given by the witnesses on the stand that Reno shrimp was different, uniformity in size and other things that make them a choice shrimp.

When he gets that letter of February 25th he is upset. We say we have been damaged. He knows right away that if they are going to breach their contract with him he cannot supply these customers that have been looking to him over the years for him to supply them this particular kind of shrimp. So, as I say, he tries to iron the matter out without any degree of success, but he then goes out, not just going to sit down, and whatever damages he has sustained charge the plaintiff with it.

805 He wants to be fair about it. So he goes out then to try to minimize the extent of his damages. He goes out and he tells you to try to sell some domestic shrimp that somebody gets from some other place. Then he told you, and the evidence so discloses and it is not contradicted or denied, that as a result of that refusal to ship or to give them Reno shrimp that three of the customers, all three of them large customers, were lost altogether and one fishery where they had been purchasing a hundred thousand pounds—I forget the exact figure. We have the document here, and it will show that their purchasing was reduced to one-fourth. They had been purchasing one hundred thousand dollars worth, and now they purchased twenty-five thousand. So, certainly, you can see where he has been damaged. Hasn't his good name and his business name, his business reputation, been damaged? After all, ladies and gentlemen, you don't live in this world, you don't become a director of a big corporation for 25 years, you don't engage in business for three to five years, and develop a good business reputation for nothing. It means something to you. It has its value to you.

Mr. Kohn: I would like to object to that line of argument on the ground that the matter of damages and
806 reputation is not involved in this case. There has been no proof of that.

The Court: Objection overruled. You are pretty near coming to the end of an hour, you know, if you want to save a half hour.

Mr. Clayton: Yes, sir, I see. How many more minutes, your Honor?

The Court: Your hour will be up at twenty-one minutes past.

Mr. Clayton: I will govern myself accordingly.

The Court: Yes.

Mr. Clayton: Not only as I said has he been damaged there but Defendant's Exhibit 87 which is in evidence, which you will have an opportunity to look at, will show how his sales fell off.

Now, what does Counsel here have you believe? He tells you, oh, I was able to find out that in October and November that the plaintiff, that the defendant, was using the money that he owed to the plaintiff to finance Prawns. He wanted to get out of this contract. That is his theory. The defendant wanted to get out of the contract with Reno and he is basing it, because there was a corporation formed in 1953, in either October or November, in which Robert Appelbaum, one of the sons of the defendant, hap-
807 pened to be a 51 per cent stockholder. You heard him say he had nothing to do with policy. He invested in it. He told you the name of the lady that was running it and who controlled it and that when they purchased from Prawns they paid him as any other person paid him, when they bought merchandise from him. But because there had been a loan or an advance, he wants you to believe that that was the plaintiff's money, and that is what the defendant had in mind when he wanted to cancel the contract. There was no evidence that the fellow ever wanted to cancel it. Every one of those documents showed he wanted them to live up to their end of the bargain. And I would say, would he contend that if the plaintiff loaned money to Prawns that it was the plaintiff's—if the defendant loaned money to Prawns it was the plaintiff's money? Didn't he loan the plaintiff in this case $68,000 at one time? Didn't he loan him from twenty to forty at other times? He didn't have to take any money that belonged to any other person if he was going to make an advance to them. But I say, as I started to tell you, that he was obligated under the law, they having breached their contract and terminated it with him, to try to minimize his damages, so certainly he is going to try and purchase shrimp
808 so that he can then attempt to satisfy some of his customers.

809 He doesn't want to go out of business over night and he lost three of his great customers and one of the great ones reduced their buying power by three-fourths. I have just told you that.

Now, I don't see anything wrong there. Counsel certainly thought that he had brought something to the attention of you ladies and gentlemen. He was going to discredit Mr. Appelbaum. I think it was yesterday afternoon. You heard him reading from a deposition which he took when Mr. Appelbaum was in his office. I forget the ones. I think that it was pay that he referred to. But he had it there. And there Mr. Appelbaum told him, "I don't own any stock in Prawns." He never did own any. "My son owned 51 per cent." His son told you that. No effort to conceal anything. You observed his demeanor and conduct on the stand. Did he appear to be a gentleman who was trying to deceive you, trying to conceal something from you? I think he tried to answer the questions as they were put to him without any falsification. Didn't he impress you as being that type of an individual?

Let us see what these depositions he was reading from disclosed. He read from them, I think, beginning at 63 and 64 where it says there, "I was a stockholder," but he omitted to read there where the defendant at that time
810 told him, "I am no stockholder." He never was. Now, who wants to be fair with whom? I am not going to try to tell you that Mr. Pinson and Mr. Fraustro said something when I know and you know that if the record shows they said it that that was corrected by those gentlemen themselves at the very time. So it was no effort to conceal then or now. But they read only and stopped. But we were able to bring to your attention that part of the deposition where he said at the same session that, "I want to correct the record. I was not and I am not now a stockholder of Prawns." Was that contrary to any evidence that he gave on the stand and was testifying on direct? I say that it was not and you know it as well as I do.

The Court Reporter is taking statements down and maybe he asks a question that he don't know and the answer is given and he misunderstood, the Court Reporter at the time he was making this statement he may state that a certain thing happened and then you remember that it didn't happen and you correct it. No effort to deceive anybody. On the stand here under oath, he told you that

he was not a stockholder of Prawns and the deposition so stated also. He had nothing to refute what he said.

811 And I say that these statements about advances to Prawns being made of money that was due the plaintiff isn't warranted or borne out by the evidence in this case. You heard it and I am not going to argue more about it because I think you ladies and gentlemen have been attentive and listened to it; far be it from me to try to deceive you.

The Court: Your hour is up. You have one more minute.

Mr. Clayton: With respect to the damages, I will comment on that later, and mention a few other things about it and you will recall, as his Honor has told you that we will have an opportunity to talk about 30 minutes later. So I think up to now the evidence discloses that the plaintiff breached the contract. The defendant has been damaged and I will try to point out to you the extent of that damage at the next time that I am given the opportunity to point it out to you.

The Court: We will recess now until 2 o'clock this afternoon.

(Whereupon at 12:30 o'clock p. m. a recess was taken until 2 o'clock p. m. of the same day, being Tuesday, June 14, 1955.)

812 Before Judge Campbell and a Jury, Tuesday, June 14, 1955, 2:00 o'clock p. m.

Court reconvened pursuant to recess.

Present:

Mr. Louis A. Kohn and Mr. Patrick O'Brien appeared on behalf of plaintiff;

Mr. Robert A. Sprecher and Mr. Joseph Clayton, appeared on behalf of defendant.

813 (Whereupon the following proceedings were had in the court room in the presence and hearing of the Jury:)

The Clerk: Case on trial.

The Court: Mr. Kohn, you have used 39 minutes of your time. The rest is available.

Mr. Kohn: Thank you.

Closing Argument on Behalf of the Plaintiff.

By Mr. Kohn:

May it please the Court.

The Court: Mr Kohn.

Mr. Kohn: Ladies and Gentlemen of the Jury:

We are now approaching the end of this long trial. If you will bear with me just a few more minutes I will have a few more things to say to you in my closing argument. I am confident Mr. Clayton's eloquence will not discredit the fact that the defendant was shipped eight carloads of shrimp for which it has not been compensated. We are merely asking that the defendant pay us from the proceeds of the sales of the shrimp, which were admittedly made. We had the computation made by a Certified Public Accountant and his figures are based on the records in the defendant's office and on admissions by the defendant, not only by documents, but oral as well.

Mr. Clayton based his defense on the fact that the
814 shrimp for which we are claiming payment were not completely sold out.

You will recall in my opening argument and also in my closing argument today I called to your attention the provisions of the contract that beyond any ambiguity whatsoever, provided that these monthly reports were to go out on the 15th of the following month and payment was then to be made.

Now, the defendant has the audacity to claim that because of some variations from that practice that the contract had been modified. Well, on that it is encumbent on the plaintiff to show something in writing to negative that alleged practice. Well, the mere fact that there may have been a few instances, does not mean that the contract has been modified. It is inconceivable, it seems to me that with all the correspondence and the many documents which passed back and forth that if there were a modification agreed upon that the defendant would not produce such a document. Well, we have looked through the files and my hunch in that regard was justified because I happen to have a document here which has been introduced in evidence, and there was no objection to it, a letter from the defendant to the plaintiff, dated August 6, 1953, Plaintiff's Exhibit No. 21, and I will read from it, and this
815 is in evidence, and you will be entitled to look at it.

I will read from the paragraph beginning at the bottom of page 14, Mr. Clayton, which reads as follows:— after discussion of many other matters.

"Aside from this it was the understanding from your letter dated July 22, 1952, in which the commission was reduced from seven to five per cent, that in return we were to be completely absolved from the financing responsibility, while the understanding was that we would pay the bank when we were paid. There was not one car out of the 30 that was not paid long before we received our money for it and long before the due date. Moreover, if you will check your records I sincerely doubt that you will find more than a few cases where we failed to pay the bank for any car before it was completely sold out."

Well, mind you, ladies and gentlemen, this letter was written August 6, 1953, at the end of the 1952-1953 shrimp season, diametrically opposed to the contention and despite the contention of the technicality that the defendant is relying on to evade payment of his just obligation.

816 The Court: What is that exhibit number, Mr. Kohn?

Mr. Kohn: Plaintiff's Exhibit 21.

The Court: Thank you.

Mr. Kohn: Now, you recall during the September conferences there were many conversations back and forth regarding this entire transaction. Do you recall any instance when any of the participants to that conference reported on the witness stand that there was any point made by the defendant along the lines that they are advocating here today?

The first reference to that was in the October wire sent by defendant in response to the October wire of plaintiff that full payment be made. Now, as late as October 14th— would you let me have Mr. Collenburg's testimony?

1953. This testimony is undisputed. There was a telephone conversation between Mr. Monroe Collenburg, a New York attorney, and the defendant. You recall Mr. Collenburg's testimony.

He said:

"I told him—"

That is Mr. Henry Appelbaum. This is a telephone conversation.

"—that I had been in touch with the people in 817 Mexico. They had told me that they had not received payment for the shrimp that he had already sold and

for which he had not remitted; that he hadn't given them any assurance that he was going to pay up, and I asked him, 'What are you going to do about paying up for what you have sold and have not remitted?'

"Q. What did Mr. Appelbaum reply?

"A. He said, 'What guarantee am I going to have that they are going to go ahead with the contract?'

"I said, 'Mr. Appelbaum, when I was with you back in September, the last thing was, that you were going to go ahead with the contract as we did. Now they told you that they are and I assure you that they are, and it is up to you to go ahead too.' And I said, 'They consider it, and so do I, a breach of contract on your part now, and I think really you ought to consult a lawyer before you make a final decision on it.'

"And I asked him also, 'How much is it that you now owe for what you have sold?'

"He said, 'I don't know the exact figure.' He mentioned it was around $140,000 worth."

Nothing was said then about not owing because the carloads of shrimp had not been sold in their entirety.
818 And I, as I pointed out in my opening argument, to place this construction on this contract would be ridiculous, and it is not entitled to credence.

Now, the defendant further points out in connection with the payments that were to be made to the plaintiff at sometime in the Fall of 1953, the two letters of credit were issued totalling $60,000.00. He forgot to tell you that under the contract, the letters of credit only covered 75 per cent of the purchase price.

The invoice price and that on each carload there would be a variation of 25 per cent, a margin as to which the plaintiff would not be protected. And in view of the past record of the defendant, it is obvious that the issuance of this $60,000.00 letter of credit would not be adequate protection and putting yourself in the position of the plaintiff at that time, in view of defendant's insistence that it was not obligated to pay and its refusal to pay I think you will agree with me that regardless of all technicalities the plaintiff acted as a reasonable business man, a man with due regard for the interest of his Company, would act.

We therefore submit that this whole argument is born in desperation and does not justify this long continued
819 default which continues to this day. No offer of any

kind has been made to recognize any part of this obligation; but the defendant persists in its refusal.

Next, the defendant would have you believe in spite of all the uncontradicted testimony of all the witnesses that had participated in the September conference that the notice of termination that was served by the plaintiff in 1953, February, was not effectively withdrawn.

As the Court will direct you, I believe, it is possible for a party, even though once having given notice of termination, to withdraw that notice under certain circumstances. And what is the record on this? Mr. Clayton apparently has overlooked the uncontradicted testimony of all the witnesses on this point, both plaintiff and defendant's. I am reading from the transcript, page 261 when Mr. Fraustro testified on cross-examination, as follows:

"Q. At that meeting,—"

The meeting at which all the gentlemen were present.

"—did not Mr. Collenburg, after there had been a discussion, state that the only thing to do is to go through with the contract? Didn't he make that statement?

"A. Yes."

820 Mr. Collenburg testified to the same effect on direct examination when he said, speaking of the same meeting:

"And I said to him, words something like this, 'As I understand the situation is, you say you have a good contract with Reno for the balance of the year. Are you ready to perform it? You want us to do it, isn't that so?'

"He said, 'Yes. That is it exactly.' With that we left."

Then, Bob Appelbaum, speaking of the same conference, or the conference on the same day said:

"Before Mr. Collenburg left, I came before the three gentlemen left but I do remember Mr. Collenburg saying:

'I suppose we will have to. That means we will have to go through with the contract.'

"And my father said:

'That is fine with me.'

"Q. Anything else?

"A. Mr. Collenburg said, 'That is all I can remember.'"

I beg your pardon. That is Mr. Robert Appelbaum's testimony. The question was:

"Anything else was what Mr. Appelbaum said?

821 "A. That is all that I can remember."

Nothing said about these new conditions that the de-

fendant is now trying to impose in the contract. I believe the Court will direct you that a party cannot impose new conditions to suit his convenience but must take the contract as he finds it.

And finally, Mr. Appelbaum, the defendant, himself, speaking of the conference at which the larger group was present in September:

"What took place when they returned?"

This is a final conference.

"A. Mr. Collenburg said, 'Will you take the $40,000.00 that we had offered you?'

"I said, 'No, sir.'"

Then quoting Mr. Collenburg again:

"And step out of the contract."

And continuing, Mr. Appelbaum said:

"He said, 'Well then, there is nothing left for us to do. Then I suppose we will have to go through with the contract.'

"Q. What did you say?

"A. I said, 'That is all right with me if I get assurance that they were going through with the contract.'

822 "Q. You say that you told them it was all right if you got assurance?

"A. That they were sincere in their offer."

Now, shortly thereafter came a wire of October 3, indicating a definite action on the part of the Board of Directors of Reno. Now, what better assurance is there? The governing body of the corporation—made up of many Directors of which were representatives of Nacional Financiera, which organization the plaintiff said he would rely upon, or the defendant said he would rely upon.

Well, I read that to you this morning. This is a wire which I suggest you examine carefully because that definitely stated the position of the plaintiff in words that no one could misunderstand. Now, this talk about security which I told you this morning in my opinion was a subterfuge. As a matter of fact in the month of October when the defendant admitted to the plaintiff that there was $140,000.00 credit due the plaintiff, the defendant had an inventory on hand of from 50 to $60,000.00. I submit that would be amply adequate if the defendant had any doubt about the plaintiff's performance. But if the defendant had any doubt about plaintiff's performance

823 why were they so anxious to do business with the plaintiff? There were other shrimp dealers on the

West Coast of Mexico. And if the Court will direct by the defendant constantly bringing up this point about guarantee is a departure from the terms of the contract, which the defendant had no right to do.

So I submit to you just as I began the evidence is clear that these shipments were made. The evidence is further clear that the plaintiff is entitled to $207,784, not including the $3,000.00 that Mr. Olsen admitted were somewhat debatable but after which I submit the burden is on the defendant to explain, plus interest which is computed in Plaintiff's Exhibit 19, which brings the total up to another $16,000.00.

In closing I want to mention briefly the matter of damages. Mr. Clayton has the last opportunity to discuss that matter and he has indicated that he will talk about damages. I am confident that if you follow the direction of the Court, which I believe you will be told that it is up to the plaintiff, or to the defendant to prove by a preponderance of the evidence that actual damages were incurred and that there will be a finding in favor of the plaintiff and no recovery for the defendant even if all my other arguments to you will be rejected. I sincerely trust that it will not be and I sincerely thank you for your attention and courtesy.

824 The Court: Mr. Clayton, you have 30 minutes of your time left in which to conclude.

Closing Argument on Behalf of the Defendant.

By Mr. Clayton: As I told you just before we adjourned—

The Court: Speak a little louder.

Mr. Clayton: As I told you just before we adjourned I would try and address my remarks to the question of damages which we contend that the defendant sustained.

Before going into that I am tempted, and upon some of the things that counsel for the plaintiff said, but I will defer that for the time being because I think I attempted to make it clear in our prior statements that the position that we take in the matter is simply that we had a contract. We had one back in 1950, dated October 19, I believe that ran for two years. July 22, I think it was renewed in 1952. It ran until August 15, 1954. That on February 25 they attempted to breach it. They stated in that wire of Febru-

ary 25 that it would terminate in August 15, 1953. That at no time prior to August 15, 1953, did they send any communication stating that they did not intend to go through with the cancellation. That after August 15, 1953 they persisted in their contention that the contract was at an end and then when they came up in October, as
825 counsel said and sent a wire, they having breached and terminated the contract by this series of documents which you have an opportunity to examine when you retire to deliberate upon your verdict, before they could impose a contract upon the defendant, now the defendant would have to agree to its terms and there is not one scintilla of evidence in this record that the defendant agreed to anything pursuant to what they said in October 20, and October 3.

True, he wanted to do business with them but he told them the condition under which he wanted to do business. We say that the contract had not been broken by the plaintiff. The defendant as I told you had been damaged. I began to comment upon the damage that was done to his business reputation because, I stated before, the contracts between individuals and firms though reduced to writing are worth no more than the word or understanding of the individual that makes the promise. If an individual makes a promise that he is going to pay you he can sign up a number of notes and documents. If he doesn't expect to pay you will have trouble collecting it. If he expects to pay you he doesn't have to reduce it to any writing or have it signed or anything. On the due date he will pay you.

826 That is just the way people do, and Mr. Appelbaum had developed that reputation. As I explained to you, and revealed to you, his many years as a director of Goldblatt's.

Now, he having had his contract cancelled, what were his damages?

Mr. Robert Appelbaum told you that according to the information furnished by Reno pursuant to the depositions that were propounded to them, that they were given the number of pounds of shrimp, the value, the sales for the year covering that season which Reno sent to E. A., and in turn, to Crest. That was the set-up that they had used to do away with the defendant's contract.

So, we are entitled to, since we were going to have to purchase the entire supply of Reno, we now are entitled in

calculating our damages to decide how much of those sales of Reno went to the organization that they decided to do business with. And, it was a million and some thousand dollars' worth. The defendant, being entitled to 7 per cent, I think that calculation came down to $84,252.00. That is what they would have received. Under the terms of the contract they had had with Reno, and it is uncontra-
827 dicted, he testified to it, and there is nothing in this record to refute it, that he could not lose. All that he was doing was selling. So, if he is selling on a commission, he could not lose. He was not financing it any more.

So, for the entire sales Reno made through E. A. to Crest, we are entitled to the commission on that. That is $84,252.00.

In addition to that, when they started to try to minimize their damage, you heard Mr. Appelbaum and Robert Appelbaum, the son, say they had lost $50,000. There is no question about that. In addition to that, he lost customers. He lost good will.

Counsel this morning stated that in our counterclaim we mentioned $362,000. That is true. But, that was based upon also the damages we tell you we claim to have sustained as a result of the entry into an oral contract. The Court has taken that part of it away from you. So, we still say that part being taken away, we are entitled to $84,252.00, seven per cent of the sales. We are entitled to be reimbursed for $50,000 loss. We say for the loss of customers, and damage to our good will, the reputation, and so forth, we are entitled to another $100,000.

828 I say, ladies and gentlemen, that I honestly believe that the evidence certainly shows that we have been damaged, and that the plaintiff breached the contract. We are entitled to this sum of money.

I think His Honor, when you came in this morning, read off certain interrogatories to you, and among them he asked:

"What, if any, money was to be credited the plaintiff as a result of any shipments—" or words to that effect.

You heard that. That will be one of the interrogatories submitted to you.

Counsel for the plaintiff states that there is no question but they sent eight carloads of shrimp. I don't think you have heard any person on behalf of the defendant say that the plaintiffs did not send eight carloads of shrimp. But, what the plaintiffs did, since the practice was that

those shrimp were to be paid for when the cars were completely sold and not before, they then, after they had attempted to breach the contract and finally terminated the contract, then they come along and say that, "You owe us the money, even though the cars have not been sold," and they want us to pay interest for that from some date that they set.

829 You remember when we asked Mr. Olson for the computation of interest, that is based on the assumption that the money was actually due, and the date that it became due it was not paid by the defendant. We say it did not become due.

We admit that they were entitled to some credit for the eight cars of shrimp that were sent, but we say that for that claim, it has been more than offset by the $200,000 damage that we have sustained as the result of them deliberately breaching their contract.

Now, with respect to the testimony that has been mentioned of Mr. Robert Appelbaum. There has been some statement here that might lead you ladies and gentlemen to believe that when he took the stand and told you the amount of sales, the amount of losses, the amount of profits, if any, which Penguin Frozen Foods sustained, that he was not telling you the truth.

I am going to again ask you to think back and picture, if you can, Robert Appelbaum on that witness stand. You saw him. I think the Court will tell you you have a right to take into consideration in determining the amount of credence or credibility you will give to the testimony of a witness, you can take into consideration their demeanor and conduct on the stand, the candor with which they

830 so testify, the opportunity that they had for knowing the things about which they testify.

Wasn't he candid? Did he not appear to want to tell you the truth? When they asked him, "How much profit did the partnership make?" He said, "I can't answer that. You possibly have some records that if I refer to them I could tell you."

So Counsel keeps asking him, "About how much?"

He said, "Oh, about $4,400." I think that is the figure that he said. But, he said, "Approximately."

And then Counsel this morning would tell you that because it has been stipulated that in the 1954 income tax return of the Penguin Frozen Foods, the partnership, that it was shown that the total profits, the total net

earnings was thirty-some thousand dollars, that we will deduct from that amount the money which the three partners took in lieu of salary, they having spent one hundred per cent of their time in the business, does not mean that they took in addition to salary, but in lieu of salary.

In other words, that is all they got. And whether you call it in lieu of salary or salary, salary is the legitimate business expense. So, that would be deductible before you could arrive at what the net profit of the partnership was.

831 When you deducted that, pursuant to the stipulation that His Honor read to you, you had net, $6,600.

Does that show that he was attempting to mislead you when he said, "Around $4,400, approximately?" When he did not have any books and records? Doesn't that appear that he was trying to tell you the truth?

Didn't he also tell you that except for a tax adjustment which was claimed, they would have lost, because they were given a benefit of $15,000 tax deduction. He told you that, didn't he? Did he try to conceal any of that from you?

So, I say, the defendants have been frank; they have been candid; they have tried to tell you truthfully just what the operation and the dealings that they had with the plaintiff were.

Now, when they go to determine whether or not the plaintiff intended to be frank and fair in all of their dealings with the defendant, I have only to ask you to think back to the dealings that were testified to by the defendant, Mr. Appelbaum, when he tells you that Mr. Pinson tells him to give him a letter concerning the market, and then he takes that same letter into the board of directors' meeting, and says, "This is what he gave me

832 in response to a letter that I gave him in Mazatlan on July 17."

Does that tend to show that he wants to be frank? Does it tend to show that his entire dealings is to wash Mr. Appelbaum out?

Let us see who he is. Is he just one of these employees of Reno, as Counsel says, Counsel for plaintiff would have us believe?

Didn't he testify that he was the general manager? Didn't he testify that he was interested in organizing a group of shrimp producers on the West Coast of Mexico which he referred to as beginning down at the Gulf of

Cortez? He was doing it so that they could channel all of the production through whom? Through an organization which he was instrumental in organizing. He was a director of it. For the purpose of doing what?

Selling the shrimp in the United States through an importing company with which he is instrumental in forming. The documents speak for themselves. He is a director there.

Lo and behold, as a result of the corporate minutes of Crest Importing Company, which we were able to check, we found that he was the chairman of the board of directors.

833 Now, you know what the chairman of the board of directors of a corporation does?

Dictates primarily its policies.

Do you mean to say that he, being general manager of Reno, he, the same individual that does not want the contract with Mr. Appelbaum—still a director of E. A., Exportadores Asociados—he, being also a director and chairman of the board of Crest.

Can't you see the conspiracy, if you want to call it that, that had been entered into to breach the contract that they actually breached beginning back February 25th, and terminating on August 15, 1953?

Now, can you say that because they have done that we have not been damaged?

They have told you what their damages were.

Now, Counsel for the plaintiff in his opening statement made this statement, and it was very significant. He stated that if one wants his cake, he must pay his penny. Mr. Appelbaum did not want to breach any contract. He wanted them to live up to the contract. It had until the season 1954.

Mr. Pinson never wanted Mr. Appelbaum to have a contract.

834 Mr. Willis, the president of Crest told you that he was, to put it mildly, astonished, and he considered the fact that the contract might have to go for a year catastrophic. In that regard, the letter that was read to you, ladies and gentlemen, he said that if there is anything that he can do to help them terminate it, he would.

Wouldn't that tend to show that even though they might send some wires on October 3 and October 20, they never intended to go through with anything?

And, isn't it apparent to you by this time that they

could not go through with it? You heard read by Mr. Sprecher these communications that went on between Mr. Willis and Nacional Financiera, and with respect to contracts that had been entered into with E. A., in which in the beginning you heard the name of Reno, and then in the final draft that was not signed until 1954, and the name is not there, but they refer to an agreement that had been entered into in the Mexican language back during this very time.

Why omit the name?

I don't think we have to stand here and argue to you and convince you of the reason. You know. They were trying to conceal the fact that Reno was selling its supplies to E. A., E. A. to Crest, and they never intended and
835 they couldn't go through with any contract that they had with the defendant.

836 Now, when he tells you about the guarantee, let us see whether or not he is sincere in that.

As I told you and the evidence has pointed out that it was Mr. Appelbaum's thought in the beginning that he had nothing to the contrary that he became aware of that he was dealing with responsible business men; that is Mr. Pinson and Mr. Fraustro.

But what attitude would you take beginning February 25 with all these communications that you heard read to you that was sent by them, with the repeated request by the defendant to live up "to your end of the bargain, because the contract still has until 1954 to run"? Wouldn't you then begin to wonder whether or not this business man that you thought was on the level was really on the level?

Didn't he tell you that when he went to Mexico, that one of the members of the very organization told him what Mr. Pinson had done with respect to his Company in the Board of Directors, and they feared it was too late; that the new administration had decided to go along with Mr. Pinson, and that he did not want the Appelbaum contract to continue in force and there was nothing "you could do about it."

That testimony was not contradicted nor denied.

837 Let us look at the guarantee. They said Nacional Financiera would guarantee it. That is what Mr. Appelbaum requested. Let us analyze that. Nacional Financiera when Mr. Appelbaum loaned them $68,000.00 under the October, 1950 contract guaranteed that. That is Nacional Financiera.

Nacional Financiera through E. A., according to the documents that were read to you, guaranteed payment of two and one-half years of Mr. Willis' salary. Nacional Financiera guaranteed the payment of Reno to the Bank of America.

But, after Reno, the plaintiff in this case, had decided that they were going to terminate their contract, and the defendant had every reason to know that they did not and were not acting in good faith, and wanted some assurance that they would comply. He asked first Mr. Collenburg, and you heard what he said. "I am just a lawyer. I cannot guarantee anything."

"Will Nacional Financiera guarantee it?" What did he tell you? He said, "I told him, 'I will find out.'"

Now, if the attorney for Nacional Financiera, and he is the attorney for the plaintiff, so you might know
838 why I asked him that Nacional Financiera didn't and wouldn't guarantee it and he told you that was correct.

Now, why would counsel here try to mislead you by saying that he was not entitled to any assurance when Nacional Financiera that owned 75 per cent of the stock thought such little of the plaintiff that it would not give the defendant a letter of assurance?

Now, they say that the first that they heard of this statement about the cars being paid for when they were completely sold out was evidently when I made the statement this morning. I don't think that I intended to misquote the evidence, but for fear there might be some apprehension on your part that I did, I refer to just to the statement of Mr. Pinson's answer.

I think you remember him making this statement. It is on page 123.

(Reading.) "Q. Now, as that agreement went on and the cars were shipped and the cars were sold, remittances would be made by the defendant to your Company?"

"A. That is correct."

Now, did we make that statement or did the plaintiff's own representative as general manager say it? And,
839 that arrangement, that is the arrangement under the extension agreement of July, 1952. It went on as the cars were sold out, the remittances would be made by the defendant to the plaintiff.

Then they quote possibly a different context to mislead you ladies and gentlemen. I will read something. I am just going to re-read it and see whether or not it bears

the interpretation that he said, in view of the statement that I have just called your attention to that Mr. Pinson's answer made.

Reading from page 4 of this last paragraph:

(Reading.) "Aside from this, it was the understanding from your letter dated July 22, 1952, in which the commission was reduced from 7 to 5 percent that in return we were to be completely absolved from the financing responsibility, while the understanding was that we would pay the Bank when we were paid."

Didn't Mr. Pinson say that when the cars were completely sold out they remitted? Isn't this what he is saying? We would pay when we were paid. That is the understanding.

There was not one car out of thirty that was not paid long before we received our money for it, and remember, long before the due date.

840 What was the due date?

Mr. Pinson said the due date was the date that the car was completely sold.

Yet, the defendant here, not trying to keep anything from you, would pay long before the due date.

But, they called your attention to the fact that there was a due date. That is all I have attempted to tell you, the position of the defendant, what it was. That it did not become due and payable until the car was completely sold.

Having breached the contract and terminated it, they then imposed a provision and condition that was not in any contract when they wanted the defendant to transmit certain money before the cars were sold to the Bank before a certain day in October. It was evidenced by that document I read to you.

Now, I say to you that instead of the defendant imposing some condition, it is the plaintiff, having breached the contract, who now attempts to impose a condition that is not included in any agreement nor was it the practice.

So, you see when they read to you, if they read the entire thing, you can get a complete picture of the dealings of the plaintiff and the defendant.

841 Now, I say in reviewing this, and on behalf of the defendant, we do want to express our appreciation to each of you for the amount of attention that you have given to this case. The case is simple in a way. I think you ladies and gentlemen understand the picture.

I don't think that you ladies and gentlemen get the impression that there are 8 cars of shrimp and nobody wanted to pay anybody for them.

I think that you get the position of the defendant that there were 8 cars shipped. Those cars were shipped before as had previously been explained to you. They were selling them out according to the practice, to be paid for when they were sold out. Yet now the plaintiff now comes in and says, "We want to be paid for whatever portion you might have sold before the due date." And they want to charge us interest on that. We say they have no right to do it. Under the contract we were then operating under, and we say that when the cars were sold they have credits. There is no question they would have credit. They are entitled to credit.

Did the defendant at any time deny that the plaintiff was entitled to credit?

Didn't the memorandum referred to as the Sprecher
842 memorandum that was sent to plaintiff or plaintiff's attorney by Mr. Sprecher, one of the attorneys on the case, list the credit they would be entitled to?

But, he stated it was not due as they claim that it was due.

Now, whatever credit they may have been entitled to, now we say that then single-handed, without any legal authority or real rhyme or reason, they cancelled our contract. They caused us damages to the extent of $200,000—and some odd dollars.

I say whatever that credit is it has been absorbed and offset by the damage that we sustained. We still have sustained more damage than they claim that they are entitled to—the credit, that is.

I am going to ask you, ladies and gentlement, when you retire to consider the evidence and consider the interrogatories, and even though you feel that they may have been entitled to certain credits, when the question is asked of you, "Did the plaintiff breach their contract," and the answer is either "Yes" or "No," I am going to ask you to think back on all of these communications beginning with February 25 and up to and until the 20th of October, and see whether or not they did not breach their contract.
843 See whether or not they were sincere when they sent the wire and said, "We are going to be bound by it."

As Counsel put it, "What more assurance than the meeting and the resolution passed by the board of directors?"

The board of directors of what?

Of the plaintiff. The board of directors of the company that Mr. Pinson was the general manager of. That is the board that Mr. Saenz and Mr. Alcalde told Mr. Appelbaum that the plaintiff, now being in control of the new administration, would go along with what he wanted. That is the board that sent that wire.

In that same wire when they say, "We are going to ship on October 9th, one carload, and confirm your letter of credit."

I think the evidence is undisputed that they sent not one letter of credit, but two.

He would have you believe that the inventory for the car would more than offset the letter of credit. Let us see. Their claim of credit that they are entitled to, $198,000, or some such sum for eight cars of shrimp. That would not be $30,000 a car. Eight by thirty would be $240,000. And the inventory value of a car is not $30,000.

The plaintiff says $60,000, two letters of credit.

So, why wouldn't they have sent that one car on October 9th, if they intended to do it. They didn't do it.

The Court: You have two minutes, Mr. Clayton.

Mr. Clayton: Yes, sir.

They thought by sending a wire they could impose a condition upon the defendant that no contract provided, and make a contract with them that they had not consented to.

I say, as I started out to request to your attention, that when you get to answer that interrogatory, I think the evidence will conclusively show that they breached, and we have sustained damages. I have already pointed them out to you.

We respectfully ask you on behalf of the defendant to bring in the interrogatory giving us the damages we have been entitled to.

The Court: We will recess until tomorrow morning at ten o'clock.

(Whereupon an adjournment was taken in the above-entitled matter until Wednesday morning, June 15, 1955, at ten o'clock a.m.)

845 Before Judge Campbell, and a Jury

on Wednesday, June 15, 1955,
at 10:00 oclock a.m.

Court convened pursuant to recess.

Present:

Mr. Louis A. Kohn and Mr. Patrick O'Brien, appeared on behalf of plaintiff;

Mr. Robert A. Sprecher and Mr. Joseph Clayton appeared on behalf of defendant.

846 The Clerk: No. 53 C 2482, Refrigeradora Del Noroeste *vs.* Appelbaum on trial.

The Court: Bring in the jury.

(The following proceedings were had in the hearing and presence of the jury.)

Court's Charge to the Jury.

The Court: I wish now to instruct you on the law on the case wherein you have heard the evidence and the arguments of counsel. These instructions that I am about to give you should be considered by you as one connected series of instructions. You should not pick out any one individual instruction and disregard the others, but you must take all of the instructions together, as the law. Incidentally, after they are written up a copy of them will be sent to you in your jury room.

First, let me briefly summarize the pleadings as they now exist. You will recall that I struck one of the counterclaims in the case so as the pleadings now stand it is a complaint of the plaintiff and the answer and single counter-claim of the defendant.

The plaintiff's complaint in brief alleges that on or about July 22, 1952, plaintiff and defendant entered into a written agreement providing for the shipment by the plaintiff of frozen shrimp to the defendant for the period from August 15, 1952 to August 15, 1954, payment to be made therefor by the defendant at the rate of 95%
847 of the amount received on resale by the defendant. The remaining provisions were to be governed by

previous contract dated October 19, 1950, the complaint alleges. Both the contracts, incidentally, are in evidence and you will have an opportunity to read them.

The complaint further alleges the plaintiff delivered the required shrimp to defendant up to October 20, 1953 and lived up to all of the conditions precedent. It goes on to allege that the defendant has refused to pay the plaintiff for the shrimp thus delivered. It further alleges on October 20, 1953, the plaintiff notified the defendant of the plaintiff's election to terminate the contract on account of the defendant's breach for non-payment. Then, therefore, as a result of that the plaintiff demands payment for the shrimp already delivered and the damages for the breach of the contract by the defendant in the total amount of $250,000.

To the complaint the defendant has filed an answer in which the defendant, first, denies that the plaintiff delivered to the defendant all of the shrimp required to be delivered before October 20, 1953.

Secondly, the defendant admits that some shrimp was delivered but claims this was defective in quality and quantity.

848 Third, the defendant says that the plaintiff without justification repudiated and breached the contract by written statements to the defendant, dated February 25, 1953, March 5, 1953, July 17, 1953, August 13, 1953, August 19, 1953, August 20, 1953, August 24, 1953, August 27, 1953, and September 7, 1953. As I recall all of these written statements are in evidence and you will find them among the documents that will be sent to your jury room.

The next allegation of the defendant's answer is that the plaintiff rendered performance of the contract impossible by agreeing to sell its shrimp to persons other than the defendant since the contract specified that the defendant was to receive the plaintiff's total production.

And finally, the answer states that the conduct of the plaintiff has resulted in injuries to the defendant in excess of the sum of $250,000.00 in loss of profits, in loss of customers and consumer good-will and in reliance expenses. And, therefore, on his counter-claim the defendant demands $350,000.00 damages from the plaintiff. So much for the pleadings.

The complaint of the plaintiff and the answer and counter-claim of the defendant which I have just summarized

for you are merely the unsworn statements of
849 the parties. They neither prove nor tend to prove or to disprove any allegation in relation to the case.

Now, when you go to your jury room for the consideration of this case you will first determine whether or not the defendant is guilty as charged in the plaintiff's complaint and whether or not the plaintiff is guilty as charged in the defendant's counter-complaint, and answer. In the natural sequence of a consideration of a case of this kind you must first determine whether or not, as shown by all of the evidence, the parties or either of them are guilty as charged in the complaint or in the counter-complaint. You are not to be concerned with the question of damages unless and until you first determine from the evidence, under the instructions of the Court, the matter of liability of each to the other.

The contracts between the parties, dated October 19, 1950, and July 22, 1952, were, by their terms, to continue to exist until August 15, 1954. They are both in evidence, both the one of October 19, 1950. That is referred to as the original contract and the one of July 22, 1952 we have been referring to as the extension. Both of them are in evidence and by the extension were continued to August 15, 1954.

850 Now, the defendant contends that the telegram of February 25, 1953, from the plaintiff to the defendant stating that the plaintiff wishes to cancel the contract between the parties constituted an actual or an anticipatory breach and repudiation of the contract by the plaintiff. That is the defendant's contention.

Now, by breach of contract in law is meant the failure without justification, to perform all or any part of what is promised in a contract. By an anticipatory breach is meant any act done without justification by one party to a contract which indicates his intended repudiation of his promise to perform or continue to perform.

An anticipatory breach or repudiation once attempted can be nullified when statements constituting such a repudiation are withdrawn by information to that effect given by the repudiator to the injured party before he the injured party, has brought an action on the breach or has otherwise materially changed his position in reliance on them.

A contract is reinstated when once having been

breached by one party or the other with or without jus-
851 tification, it is restored by both parties to its former effect with full vigor and vitality. Such a reinstatement must be mutually agreed to by both parties to the contract, and must be in good faith. Such a reinstatement restores all the terms and conditions of the contract and new terms and conditions cannot be made a part of the reinstated contract unless they are specifically agreed upon by both parties to the contract at the time of the reinstatement.

Thus, if you find from a preponderance of the evidence that the plaintiff may have, without just cause, desired or attempted to terminate the contract for the shipment of the shrimp, and so indicated to the defendant, but that the defendant nevertheless at all times insisted that the contract remain in full force and effect and both parties thereafter indicated to each other their desire and willingness to continue to perform under the contract, then the contract was reinstated and the plaintiff's former desire or attempt to terminate the contract did not justify defendant's failure to make the payments provided for in the contract, nor would it permit the defendant to add conditions not authorized by the contract upon which his own continued performance was to depend.

852 Further, if you should find that the defendant failed to make payments, as provided in the contract, for shrimp received by it and sold by it, plaintiff was justified in refusing to make further shipments and such refusal does not constitute a breach of the contract.

If you should find that, by the terms of the agreement of October 19, 1950—that is the original contract—and the extension agreement of July 22, 1952, that the defendant was not authorized to pay the plaintiff after each carload of shrimp was sold out, but that some other method of payment was prescribed, nevertheless, the plaintiff by his conduct could have consented to the payment for the shrimp after each carload was sold out. The defendant, however, must establish by a preponderance of the evidence that such method of payment, that is, payment after each car was sold out, was common practice approved by the plaintiff. That is the defendant's burden to establish.

Furthermore, the plaintiff, at any time, upon proper notice to the defendant, could have insisted that any future payments were to be made only in strict accordance with the terms of the written agreements between the parties.

The burden of proof in this case is not upon the
853 defendant to show that he is not liable as charged in the plaintiff's complaint or upon the plaintiff to show that it is not liable as charged in the defendant's answer and counter-complaint. The burden is upon the plaintiff to show by a greater weight or preponderance of the evidence that the defendant is liable as charged in the complaint and the burden is upon the defendant to similarly show by a greater weight or preponderance of the evidence that the plaintiff is liable as charged in the defendant's counter-claim. The law casts upon each the burden of making out his case by a preponderance of the evidence. Now, there is no technical meaning to the term "preponderance of evidence." It simply means that the burden is cast upon the claiming party, the plaintiff, as to its complaint and to the defendant as to his counter complaint to support his claim by a greater weight of evidence than the evidence adduced by his opponent on that particular claim; that is, the evidence brought by the claimant must, in your judgment, weigh more than the evidence produced by the party against whom the claim is asserted. If, in your judgment, the evidence on either claim is just evenly balanced, the claiming party is not entitled to recover.

854 The preponderance of evidence in a case is not alone determined by the greater number of witnesses testifying to a particular fact or state of facts. It is determined by the testimony which impresses your mind and reason as possessed of the most weight and as presents the most reasonable account of the matter in dispute.

The weight of the evidence and the credibility of the witnesses are for your consideration and determination. You are the sole judges of the credibility of the witnesses. In determining the weight to be given the testimony of a witness, you have a right to take into consideration the intelligence of the witness, the circumstances surrounding the witness at the time concerning which he testifies, his interest, if any, as shown by the evidence, in the outcome of the suit, his bias or prejudice, if any, his manner on the witness stand, his apparent fairness or want of fairness, the reasonableness or unreasonableness of his testimony, his means of observation and knowledge, the relation, if any, which he bears to any party to the suit, and the extent to which he is contradicted or corroborated by other credible evidence, if at all.

In short, you should consider any circumstances that tend to shed light on the witness's credibility.

855 A fact may be proved either by circumstantial evidence or by direct evidence, or by both.

Circumstantial evidence is such evidence as tends to prove a fact indirectly and gives rise to a reasonable inference in the minds of the jury of the existence of the fact sought to be proved.

Direct evidence is such evidence as tends to prove a fact directly. The fact, as I say, may be proved by either circumstantial evidence or direct evidence if you are satisfied that such evidence is the preponderance of the evidence before you.

You are not required to believe any statement to be a fact simply because any witness or witnesses have sworn it to be a fact, if you believe from the evidence that such witness or witnesses are mistaken, or have knowingly sworn falsely to such fact, even if such witness or witnesses be not directly contradicted with respect to such matters by some other testimony.

One way of impeaching a witness is by showing that the witness has made different and contradictory statements of the same point on a former occasion. If it appears from the evidence that any witness has been impeached in this manner, then you have a right to take that into consideration in determining his credibility

856 and the weight of his testimony.

The law permits the defendant in the case to testify in his own behalf in support of his counter-claim. Nevertheless, you have the right in weighing his evidence to determine how much credence is to be given to it and to view it under the same tests as I gave you for that of all other witnesses and to also take into consideration that he is the defendant and counter-plaintiff in this instance and naturally is interested in the result of the suit.

Likewise, while you are the judges of the credibility of the witnesses, you have no right to disregard the testimony of an unimpeached witness sworn on behalf of the plaintiff, simply because such witness was or is an employee of the plaintiff. It is the duty of the jury to receive the testimony of such witness in the light of all the evidence, the same as they would receive the testimony of any other witness, and to determine the credibility of such employee by the same principles and costs by which they would determine the credibility of any other witness.

In considering this case and in passing upon your verdict, you are not required to set aside your own ob-
857 servation and experience as men and women in the affairs of life, but on the other hand you have a right, upon consideration of all of the evidence in the light of your own common observation and experience as men and women in the affairs of life, to say where the truth lies upon any material fact in the case. In other words, observe and use your own good common sense.

If you find from a preponderance of the evidence that the defendant is entitled to recover damage on his counterclaim for breach of contract, then it becomes necessary for you to determine the amount of such damages. If, of course, you should find the issues for the plaintiff on the defendant's counterclaim then you will have no occasion at all to consider the matter of the defendant's damages.

By damages is meant the detriment or wrong suffered by an injured party as the result of the other party's breach of the contract. In awarding damages, if any, you should try to place the injured party in as good a position as he would have been had the contract been fully performed, at the least cost to the guilty party and without charging him with harms that he had no sufficient reason to foresee when the contract was executed. In other
words, damages, if any, shall be measured by the loss
858 of profits which the injured party would have realized if the contract were to have been performed. The damages cannot be arrived at by mere speculation or conjecture. It is the burden of the party claiming damages to prove the same by a preponderance or greater weight of the evidence.

The party claiming damages based on breach of contract must also prove by the preponderance of evidence that a valid contract existed, that a breach of the contract occurred, and that damages resulted therefrom.

The fact that I have submitted this case to you and have here given you instructions on the subject of the defendant's damages, or the fact that plaintiff's counsel in his argument before you has discussed such subject is not to be taken by you as any intimation by the Court or as any admission by the plaintiff of any liability for the damages complained of by the defendant.

It is the right and the duty of the jury to determine the questions of fact. You must determine the facts from

the evidence. The law of this case as contained in these instructions must be applied by you to the facts as you find them from the evidence.

Neither by these instructions nor by any ruling or remark made by me during the course of trial do I
859 mean to give any opinion on any question of fact. The questions of fact are for you to determine.

It is your duty to consider this case in all of its elements the same as you would a case between two private citizens instead of a case in which the plaintiff happens to be a Mexican corporation. Foreign corporations or American corporations are entitled to the same fair and unprejudiced treatment in courts of law as individuals would be under like circumstances.

Neither are you to allow sympathy or prejudice to play any part whatsoever in your deliberations. You are to decide this case on the evidence as you heard it, and on the law as I have given it to you in these instructions. Both of these parties, the plaintiff, the Mexican corporation, and the defendant, an individual, come into this court on the same plane. This is a court of law and both sides are entitled to the same fair and unprejudiced treatment at your hands.

You will take with you to the jury room when you retire the exhibits that have been received in the case and you will also take with you the three interrogatories—they are written on one page—which I referred to yesterday morning before counsel commenced their argu-
860 ment. The interrogatories read:

"(1) What sum, if any, including interest, if any, expressed in dollars do you find should be credited to the plaintiff by the defendant for the quantity of shrimp delivered to the defendant by the plaintiff up to August 15, 1953?"

Following that there is a blank with a dollar mark in front of it. Whatever sum you find is to be inserted therein by the foreman.

Interrogatory No. 2:

"(2) Do you find from the preponderance of the evidence that the plaintiff breached its contract with the defendant?"

Then there are two square boxes, one opposite the word "yes" the other opposite the word "no." You will use the appropriate box to indicate by an "X" in the appro-

priate box your answer to the question. The foreman will so indicate for the jury. Question No. 3:

"(3) If your answer to interrogatory No. 2 is "yes" then what is the amount of damages, if any, that you find due the defendant as a direct result of the plaintiff's breach?"

There is again a blank with a dollar mark in front
861 of it. If you answer question No. 2 "yes" and determine the defendant's damages to exist then the amount of damages that you find for the defendant shall be inserted in that blank. All three questions, if necessary, must be answered, at least 1 and 2 must be answered. The foreman having answered them, the answers are to be arrived at, incidentally, by unanimous agreement. All twelve jurors must agree on the answers.

You will continue your deliberations until you arrive at a unanimous verdict as to all three questions, or at least the first two. Having arrived at your verdict and having completed the answers, the foreman will sign the verdict first. The other eleven jurors will then sign after him.

I would ask, please, that the married ladies on the jury sign their own names and not their husbands' names. That is, sign "Mary Smith" or if you like the title why sign, "Mrs. Mary Smith", but do not sign "Mrs. John Smith."

862 Opportunity will now be given to counsel out of the hearing of the jury to object to the charge of the Court. Do counsel desire to be heard? For the plaintiff? Do you desire to be heard?

Mr. Kohn: Yes.

The Court: Does the defendant desire to be heard?

Mr. Clayton: Yes.

The Court: Then you will step into chambers with the Reporter.

(Whereupon the following proceedings were had in chambers out of the hearing and presence of the jury:)

The Court: In accordance with the Rules of Civil Procedure your objections are to be specific to the charges given. It is unnecessary to argue it. Merely state, for the plaintiff, the objections to the charge.

Mr. Kohn: I want to object to your not giving instruction number—

The Court: State your objection.

Mr. Kohn: The plaintiff wishes to object to the failure of the Court to give plaintiff's instruction No. 2 for the reason that—

The Court: You do not have to state your reason; just state your objection.

863 Mr. Kohn: That is all.

The Court: Any other objections?

Mr. Kohn: That is all.

The Court: The objection of the plaintiff is overruled. Objections by the defendant?

Mr. Clayton: The defendant desires, your Honor, to object to the instruction concerning the breach. I think your Honor said that the breach is a failure to perform. I think your Honor should have included in that charge also the word "refusal", failure or refusal to perform.

The Court: Any other objections?

Mr. Clayton: We object to the instruction, your Honor, in which you referred to the testimony of, unimpeached testimony given by witness that he is an employee of the plaintiff. I think your Honor said we do not have to give the reasons for it.

The Court: No. It is not necessary. Any other objections?

Mr. Clayton: We object to the Court not giving an instruction with respect to damages which would include the loss of good-will as a part of the damages.

The Court: Any others?

Mr. Clayton: We would object to the Court's refusal to give those requested instructions which were sub-
864 mitted by the defendant to the Court which were not given.

The Court: You want to make a similar general one?

Mr. Kohn: No.

The Court: The objections are each and all overruled. All right, gentlemen.

(The following proceedings were had in the courtroom in the hearing and presence of the jury:)

The Court: The Marshals will rise and be sworn. Come over here and be sworn.

(The Marshals were sworn.)

The Court: I neglected to tell you your luncheon will be served in your jury room. The Marshals will make arrangements for it. You may retire and deliberate upon your verdict.

(Thereupon the jury retired to the jury room to consider of its verdict, following which the additional proceedings were had in the courtroom out of the hearing and presence of the jury:)

The Court: Assemble your exhibits, gentlemen, in numerical order so that the jury could follow them. Hand them up. Have you got all of them here?

Mr. Kohn: I have them. All of them in evidence.

865 The Court: All that were received.

Mr. Kohn: Yes, sir.

The Court: And in order. Are yours in order, also?

Mr. Kohn: Yes. We withdrew those that were offered and not finally admitted.

The Court: Yes. All right.

How long shall we let them deliberate? This, Mr. Kohn, is the Willis' file which I will now give you and which you will now return to Mr. Willis. This is his employment file.

Mr. Kohn: That is all that is left?

The Court: That is all that is left. You have the others I presume I will get them from your exhibits when the jury is through with them and if there are any other parts.

Mr. Kohn: The jury will get photostats.

Mr. Clayton: Some are photostats and some are originals.

The Court: Assemble all of them. That, by the way, is confidential. You will return that directly to him.

Mr. Clayton: Willis's are photostated.

The Court: Willis's are photostated. Give them back. This is the only remaining part.

Mr. Kohn: The jury only has photostats.

866 The Court: It is now twenty minutes of eleven. The jury has retired. There are quite a few documentary exhibits, as I indicated the other day. It should take them perhaps a good deal of the day so that each one of them can read all of the documents. I would say offhand that we ought to let them deliberate as late as 10 o'clock, tonight. Does that sound reasonable to both of you?

Mr. Kohn: Yes, sir.

Mr. Clayton: Yes, sir.

The Court: If they have not arrived at a verdict by 10 o'clock tonight, we will discharge them. Is that agreeable?

Mr. Kohn: Yes.

Mr. Clayton: Yes.

The Court: If they arrive at a verdict before 4:30 we will notify you and you can come over here and be present for the return of the verdict. If they arrive at a verdict after that time and before 10, is it agreeable that the verdict be sealed and opened in Court tomorrow morning?

Mr. Kohn: It is agreeable with the plaintiff.

Mr. Clayton: It is agreeable with the defendant.

The Court: By the way, if you want to make arrangements with the Marshal, if both of you agree to do it,
867 in the event of a verdict after 4:30 and before 10:00, before the verdict is sealed he can look at it and then telephone you and let you know what it is, if you would like to do that, if both of you agree to it.

Mr. Kohn: That is satisfactory.

The Court: It is up to you. If both of you would like to know tonight instead of waiting until tomorrow morning.

Mr. Kohn: It is all right with the plaintiff.

The Court: That is agreeable to the plaintiff. Is it agreeable with the defendant?

Mr. Clayton: Yes.

The Court: All right then, both Mr. Clayton and Mr. Kohn leave your numbers with the Marshal and he will telephone you in the event of a verdict after 4:00 o'clock. Incidentally, I am not having a session of this Court tomorrow. I will be here Friday. So in the event of a sealed verdict, as long as he is informing you this afternoon, let it be opened on Friday morning instead of Thursday. Is that agreeable? Be here Friday morning then instead of Thursday morning for the opening of the verdict, but you will hear of it tonight by telephone.

All right, I think that leaves nothing further. We have to enter an appropriate order.

The Clerk: How about waiving the polling?

868 The Court: In the event of a sealed verdict do you waive the polling of the jury?

Mr. Kohn: That is correct.

The Court: The defendant, Mr. Clayton?

Mr. Clayton: Sir?

The Court: You waive the polling of the jury in the event of a sealed verdict?

Mr. Clayton: Well, I think we want to poll.

The Court: Then you will have to remain in attendance on the Court. You cannot have a sealed verdict.

Mr. Kohn: They have already waived.

The Court: If you want the polling you have to stay. You will have to stay in the courtroom until the jury returns. It is all right with me, either way.

Mr. Clayton: We waive the polling.

The Court: The polling of the jury is waived by both parties. We will enter an appropriate order.

Mr. Kohn: If the Court please, on behalf of the plaintiff we want to thank you for the courtesies and your patience which you have demonstrated to counsel.

Mr. Clayton: We likewise want to do that but we want to say that is in keeping with your Honor's Court.

The Court: It is a pleasure to have you here. We will recess at this time until the return of the jury.

869 (Whereupon a recess was taken until the return of the jury.)

870 Before Judge Campbell,
on Friday, June 17, 1955,
at 10.00 o'clock a m.

Court convened pursuant to adjournment.

Present:

Mr. Louis A. Kohn and Mr. Patrick O'Brien, appeared on behalf of plaintiff;

Mr. Robert A. Sprecher and Mr. Joseph Clayton, appeared on behalf of defendant.

871 The Clerk: 53 C 2482, Refrigeradora de Noroeste *vs.* Henry Appelbaum, etc., for return of the jury's verdict.

The Clerk: Well, gentlemen, I am advised by the Marshals in charge of the Jury that at ten o'clock on last Wednesday evening, pursuant to my order they went into the jury room and inquired whether or not the jury had arrived at a verdict and were informed they had not and that they then dismissed the jury at ten o'clock.

Is that correct?

Marshal Bianco: Correct, your Honor.

The Court: Now, then as they were picking up the papers after the jury had been dismissed they find among the exhibits this document unsigned with the first interrogatory answered in the sum of $219,962.27. Interroga-

tory No. 2 not answered, Interrogatory No. 3 not answered and the form unsigned. It is obvious, therefore, that the Jury did not arrive at a verdict. At least they did not complete their deliberations and finish within the time allotted them and the verdict is not signed. But, for what it is worth, if either of you want to make reference to it and you both have motions on file that you may want to argue. I don't know whether you want to or not, one or the other or both of you. I think so that the record
572 may be complete I ought to order this filed now for whatever it is worth. As a document, it is obviously not a verdict and has no legal effect.

Mr. Kohn: I want to be heard on that point.

The Court: Well, you can argue that in your motion.

Mr. Kohn: Yes, sir.

The Court: Didn't you have a motion at the end of all of the evidence?

Mr. Kohn: That is right.

The Court: I understand both of you or some of your attorneys with the Marshal talked with the jurors. Is that right?

Mr. Kohn: Mr. O'Brien is here and Mr. Sprecher and Mr. Clayton.

Mr. Sprecher: The jurors clustered around us downstairs in the lobby, your Honor.

The Court: What did you find out? Anything further from here now is information I don't have.

Mr. Kohn: If the Court please, the information was—

Mr. Sprecher: Before we continue, I would like to object first, so that the record is clear to the introduction of that document.

The Court: It isn't being introduced. For what it is worth I am ordering it filed in the record.

573 Mr. Sprecher: Filed in the record also.

The Court: Whatever objection you may have is overruled.

Mr. Kohn: If the Court please, I have a suggestion to make: That is, that the Foreman of the Jury is on jury duty in the court room now, I understand, and I would like to produce him to show that it was the intention of the jurors to render a verdict on special interrogatories one—

The Court: Whatever their intention was they didn't do it and I will not—

Mr. Kohn: I have authority indicating that affidavits

are admissible for that purpose and certainly the testimony of the juror would be admissible.

The Court: I will hear your position on your motions and you may refer to this for whatever it is worth but I am hearing no, or I am holding no hearing on what the jurors after they were dismissed have to say about the situation.

Mr. Kohn: Yes, sir.

The Court: So it will be unnecessary to prolong the argument on that point.

Mr. Kohn: I would like then to renew my motion for a directed verdict unedr Rule 50.

The Court: Yes.

874 Mr. Kohn: Observed by the Court and in the alternative to make a motion for the entry of a judgment on the verdict represented by the answer to that interrogatory in favor of the plaintiff to the extent therein indicated.

The Court: Both motions will be taken under advisement.

How long do you want for your briefs in support of your motion?

Mr. Kohn: I am ready to argue them orally any time.

The Court: I know you are. How long do you want for your brief?

Mr. Kohn: A week.

The Court: All right, one week. How long do you want to reply? Do you want to argue your motion for a directed verdict at the end of all the evidence too? Why don't you include that in your answer to his?

Mr. Sprecher. I will.

The Court: One week thereafter?

Mr. Sprecher: Could I have a little more time?

The Court: Yes. How much do you want?

Mr. Sprecher: Could I have twenty days after their brief?

The Court: Yes. Twenty days. Do you want to take ten then?

Mr. Sprecher: Yes.

875 The Court: Ten, twenty and ten?

Mr. Kohn: All right, sir.

The Court: Put everything in your briefs, gentlemen, and I will give it consideration. I have all of your authorities. If you have any affidavits, leave to attach them.

Mr. Kohn: That is what I was going to ask you, leave to attach.

The Court: Leave to both of you to attach any affidavits.

Mr. Kohn: The affidavits of the jurors.

The Court: Or any one else.

Mr. Kohn: And one othe. request, we want leave to withdraw the plaintiff's exhibits until Monday.

The Court: The Clerk has all of them to give to each of you.

Mr. Kohn: So that we can make photostats and have our file complete.

The Court: Each of you make your exhibits available to your opponent on the preparation of the briefs.

Mr. Sprecher: Again, your Honor, for the record, may I just object to the leave to attach affidavits of the jurors?

The Court: Yes. Overruled. All right, prepare your briefs.

Mr. Kohn: Of course, my preference in the matter, but I believe you have already overruled my suggestion, as to the members of the jury are here in the court room.

The Court: Yes. I am holding no post mortem.

Mr. O'Brien: Your Honor said something about having to tell our conversations with the jurors.

The Court: Well, I assume you are now going to put that in an affidavit form, aren't you, and attach it to the motion. We haven't time for it now.

Mr. Kohn: The net of it is the intention was clear to find an amount of Two hundred nineteen thousand and some odd dollars—

The Court: Well, it is unfortunate they didn't sign it. They were certainly told how to sign it.

Mr. Kohn: I understand they were confused because they thought they had to have answers to all of them.

The Court: Well, probably they are right on that too but I will decide that on your briefs.

Mr. Kohn: Yes, sir.

The Court: Very good.

(Which were all of the proceedings had, evidence offered and received, arguments of counsel, the charge of the Court, and the return of the Verdict.)

* * * * *

143 **PLAINTIFF'S EXHIBIT NO. 1.**

(Filed Mar. 12, 1956. Roy H. Johnson, Clerk.)

This Agreement, Made and Entered into this 19th day of October, A. D. 1950, by and between Refrigeradora Del Noroeste, S. A., of Mazatlan, Sinaloa, Mexico (hereinafter referred to as "Seller"), and Penguin Frozen Foods, Inc., an Illinois Corporation (hereinafter referred to as "Buyer"),

Witnesseth:

Whereas, Seller is engaged in the business of catching, buying, packing and freezing fresh shrimp in Mexico; and

Whereas, Buyer is engaged in the business of selling and distributing shrimp in the United States of America and in the Dominion of Canada; and

Whereas, Buyer desires to buy from Seller, and Seller desires to sell to Buyer, all of the shrimp which is caught or purchased and packed and frozen by Seller, except as hereinafter provided, and the parties hereto desire to set forth in this agreement their understanding as to the terms and conditions upon which said sales shall be made;

Now, Therefore, in consideration of the premises and of the mutual covenants and agreements hereinafter set forth, and of other good and valuable considerations, the receipt and sufficiency of which are hereby acknowledged,

It Is Hereby Agreed by and between the parties hereto as follows:

1. Seller hereby agrees to sell to Buyer, and Buyer hereby agrees to purchase from Seller, all the shrimp
144 which are caught or purchased and packed and frozen by Seller during the period beginning on the date of this agreement and ending August 15, 1951; provided, however, that Seller shall not be obligated to sell any shrimp processed but not owned by Seller, or any shrimp caught or purchased and packed and frozen by Seller which are sold by Seller for consumption in the Republic of Mexico, and provided, further, that the combined aggregate of the shrimp which Seller shall not be obligated to sell shall be no more than ten per cent (10%) of the shrimp packed, frozen or processed by Seller during the term of this agreement unless the laws of the Republic of Mexico hereafter require Seller to withhold from export, for sale

in Mexico, an amount in excess of ten per cent (10%) of the shrimp packed, frozen or processed, in which event Seller shall not be obligated to sell to Buyer the amount of shrimp required by the laws of the Republic of Mexico to be withheld from export, for sale in Mexico.

2. Seller covenants and agrees to use its best efforts to catch or purchase and pack and freeze the greatest amount of shrimp possible, consistent with the capacity of its plant and the natural conditions covering the catching and/or processing of shrimp.

3. All shrimp sold hereunder shall be sold f. o. b. Seller's plant in Mazatlan, Sinaloa, Mexico, and title shall pass at the place of sale. Seller agrees that it will never ship more than one (1) carload of shrimp on any day.

4. The purchase price for the shrimp sold by Seller to Buyer hereunder shall be an amount equal to ninety-three per cent (93%) of the amount for which each pound of shrimp delivered to Buyer is resold by Buyer, payable as hereinafter provided.

5. Seller further agrees that each time that it has caught or purchased and packed and frozen a sufficient
145 quantity of shrimp to make a carload lot it will, as promptly as convenient, ship such carload of shrimp to Buyer at Chicago, Illinois, by railroad, and notify Buyer, by telephone or telegram, not less than twenty four (24) hours in advance of such shipment; provided that seller shall have the right, with the approval of Buyer, to ship by other means of common carrier, at any time, less or more than carload lots of shrimp. Seller to notify Buyer of the means of such shipment and the time of such shipment by telephone or telegraph not less than twenty four (24) hours prior to such shipment being made.

6. Seller agrees that it will prepay, as agent for Buyer, and for the account of Buyer, all freight charges and icing expenses to Chicago, Illinois, and any and all other transportation charges until arrival at Chicago, Illinois, which Seller is able to prepay in connection with all shipments.

Seller further agrees that it will, as agent for the Buyer and for the Buyer's account, keep all shipments of shrimp purchased hereunder fully insured against loss or damage, from any and every cause, to the extent that such insurance is reasonably procurable, until arrival of such shrimp at Chicago, Illinois, such insurance to be for the benefit of Seller and Buyer. Seller further agrees to furnish Buyer

with a duplicate of each such insurance policy or a Certificate of Insurance therefor.

Seller shall bill Buyer monthly for all amounts prepaid by it as agent for Buyer, and for the account of Buyer, as in this Section provided.

Buyer agrees that it will pay any additional icing charges incurred on any shipment after such shipment has passed the Mexican-United States border and will, at all times, keep all shipments of shrimp purchased hereunder fully insured against loss or damage, from any and every
146 cause, after such shrimp have arrived at Chicago, Illinois, and until Buyer has parted with title and possession thereof, such insurance to be for the benefit of Seller and Buyer, in Insurance Companies reasonably satisfactory to and approved in writing by Seller. Buyer further agrees to pay promptly the premium on such insurance and furnish Seller with a duplicate of each such insurance policy or a Certificate of Insurance therefor.

7. Seller agrees to prepay all Mexican export taxes on the shrimp sold pursuant hereto.

8. Seller covenants and agrees that all shrimp sold hereunder shall fully comply with all applicable Pure Food Laws and Regulations of the United States of America and the Republic of Mexico, and Seller further agrees that each shipment of shrimp sold hereunder shall be accompanied by a Mexican Public Health Department Certificate and any shipping authorization required by any administrative body of the Republic of Mexico having jurisdiction over the exporting of shrimp from Mexico.

9. Buyer agrees that, as the sale price of the shrimp purchased under the terms of this agreement is based upon a percentage of the price received by the Buyer on the re-sale thereof by it, Buyer will use its best efforts to obtain the highest price obtainable on each sale by it at the place of sale on the date of any sale, or contract for sale, for the size of shrimp sold or contracted to be sold, and that it will exercise its best efforts to sell the shrimp purchased hereunder throughout the United States of America and the Dominion of Canada. Buyer further agrees that it will not sell any shrimp purchased hereunder any place other than in the United States of America and the Dominion of Canada. Buyer further agrees that it will make no sales directly or indirectly, to any person, firm or corporation

with whom or with which it is in any way connected,
147 either by stock interest or in joint venture or in any other way whatsoever, without first disclosing such connection to Seller and obtaining Seller's written consent to such sale.

10. Buyer further agrees that all shrimp sold to it hereunder will be re-sold by it in the original packages, as received from Seller with the original brand name clearly visible on the package, and that such shrimp will not be sold in bulk or re-packaged in any way without prior written consent of Seller first obtained. In the event of any spoilage of package in transit, Buyer shall have the right, without the written consent of Seller, to re-package the shrimp as it sees fit.

11. The purchase price for the shrimp sold hereunder shall be paid as follows:

(a) Buyer agrees that, upon notification by Seller that a carload of shrimp is ready for shipment, Buyer will immediately (and in any event within three (3) days after such notification) establish by cable an irrevocable Letter of Credit in favor of Seller or its assignee, in an amount equal to seventy-five per cent (75%) of the market value at such time of such carload of shrimp. Such Letter of Credit shall be substantially in the form in use between the parties; shall have an expiration date twenty-one (21) days after the date of issuance thereof if the same contains provision for presentation of a Pure Food Certificate as hereinafter defined and provided; shall have an expiration date of twelve (12) days after the date of issuance thereof if the same does not provide for presentation of such a Pure Food Certificate; and shall provide that no payment shall be made thereon until there has been presented to the bank issuing such Letter of Credit—

(i) negotiable bill of lading covering the shipment
148 as to which such Letter of Credit is issued, such bill of lading to be issued in the name of Seller and by it endorsed in blank; and (ii) proper certificate (hereinafter referred to as "Pure Food Certificate") that such shipment has passed the United States federal pure food and drug inspection; provided, however that in the event more than three (3) carloads of shrimp are in transit at any one time between Mazatlan, Sinaloa, Mexico, and Chicago, Illinois, the Letter of Credit issued in regard to each of the first five (5) of

such carloads in excess of three (3) shall not contain the provision requiring the presentation of a Pure Food Certificate, it being the intention hereof that if at any time there are more than three (3) Letters of Credit outstanding, the first three (3) Letters of Credit issued in point of time shall contain the provision requiring presentation of a Pure Food Certificate, the next Letters of Credit issued in point of time up to five (5) shall not require the provision requiring presentation of a Pure Food Certificate and all other Letters of Credit then outstanding shall require presentation of a Pure Food Certificate.

(b) Buyer agrees to deliver to Seller on or before the 15th day of each month during the term of this agreement and on or before the 15th day of September, 1951, a report in writing, verified by an officer of Buyer, setting forth (i). The name and address of each person, firm or Corporation to whom Buyer has, during the preceding month or lesser accounting period, if the period covered by such account be less than one month, re-sold shrimp purchased by it hereunder; (ii) the date of each such sale; (iii) the 149 sale price at which such shrimp were sold; (iv) the number of pounds of shrimp sold to each purchaser; (v) the size (and any other grade or classification) of shrimp on each sale; and (vi) the identification of the shipment or shipments by car number, invoice number (and/or other means of identification) involved in each sale. Simultaneously with the delivery of each such report referred to in this sub-paragraph Buyer agrees to pay to Seller the balance due from Buyer to Seller on all sales made by Buyer, as disclosed by such report. The amount of such payment shall be arrived at by adding to the purchase price (i. e., 93% of the price at which such shrimp is sold by buyer) all amounts advanced by Seller as agent for Buyer, as provided in Section 6 of this agreement, which have been billed by Seller to Buyer, and deducting from the aggregate of such amount the following items with respect to the matters covered by such report:

I. The amount previously paid by Buyer to Seller on account of the shrimp re-sold by Buyer, as disclosed by such report.

II. The aggregate amount of all freight charges, icing expenses, handling charges, insurance premiums

paid for keeping shrimp insured, storage charges, and any and all other transportation charges, in connection with the transportation of shrimp, paid or incurred by Buyer.

III. The amount deducted by Buyer pursuant to the provisions of Section 14 of this agreement.

(c) In the event that within twenty-one (21) days from the date of any shipment of shrimp on which a Letter of Credit was issued requiring presentation of a Pure Food Certificate, a Pure Food Certificate is not issued with respect to such shipment, or in the event that within twelve (12) days from the date of any shipment of shrimp on which a Letter of Credit was issued which does not require the presentation of a Pure Food Certificate, such shipment shall for any reason not reach its destination, all amounts theretofore paid or caused to be paid by Buyer on account of such shipment, together with all expenses paid or incurred by Buyer in connection therewith, shall be paid by Seller to Buyer on demand, or at Buyer's option such amounts may be applied on any subsequent shipment of shrimp or deducted from any moneys payable to Buyer to Seller on the next succeeding accounting date; provided that with regard to any such shipment on which the department of the United States of America having jurisdiction to determine whether or not the same complies with the Pure Food and Drug Regulations of the United States of America has refused to issue a Pure Food Certificate within twenty-one (21) days from the date of shipment thereof, Buyer shall return such shrimp to Seller, at Seller's cost, immediately after the issuance of such Pure Food Certificate has been refused by such Department, and that with regard to any shipment on which a Letter of Credit was issued which does not require the presentation of a Pure Food Certificate does not for any reason reach its destination within twelve (12) days from the date of shipment thereof, Buyer shall return such shrimp to Seller at Seller's cost when, as and if such shipment reaches its destination.

12. Buyer agrees that promptly upon receiving notification from the bank which issues any Letter of Credit, referred to in subparagraph (a) of section 11 of this agreement that the bill of lading required to be delivered by any such Letter of Credit has been received by such bank, Buyer will promptly request the shrimp as to which such

Letter of Credit is issued to be inspected by the Pure Food and Drug Department of the United States of America
151 (unless such inspection has theretofore been made) and will promptly deliver to such bank the Pure Food Certificate issued in regard thereto.

13. Buyer agrees that for any period prior to February 1, 1951, at the request in writing of Seller, it will retain in storage, at any one time, a supply of not to exceed two hundred thousand (200,000) pounds of the shrimp sold by Seller to Buyer hereunder, and for any period between the dates of February 1, 1951, and August 15, 1951, upon request in writing of Seller, it will retain in storage, at any one time, a supply of not to exceed four hundred thousand (400,000) pounds of the shrimp sold by Seller to Buyer hereunder, and Seller agrees to pay Buyer interest at the rate of 3% per annum on the amount paid by Buyer on account of the purchase price thereof on all shrimp retained in storage by Buyer at Seller's request from the date of such request to the date when Seller notifies Buyer that it need no longer retain such shrimp in storage. In the event that the term of this agreement is not extended, as hereinafter provided, then Buyer hereby Gives and Grants to Seller the right and option to purchase from Buyer all shrimp which Buyer has purchased from Seller and has not re-sold on August 15, 1951, such option to be exercised by Seller notifying Buyer in writing of its intention to exercise the same on or before August 20, 1951. In the event such option is exercised, Seller shall pay Buyer for the shrimp as to which such option is exercised a price per pound equal to the average of the price at which the preceding ten (10) sales of shrimp by Buyer were sold. In the event Seller does not exercise such option, Buyer shall account to Seller for the purchase price of the shrimp on hand on August 15, 1951, within thirty (30) days after such shrimp is sold by it.

14. Buyer agrees to loan to Seller the sum of Sixty eight Thousand United States Dollars ($68,000), such amount to be loaned upon Nacional Financiera, S. A.,
152 guaranteeing that Seller will sell to Buyer the shrimp which it has hereby contracted to sell to Buyer, and further guaranteeing payment to Buyer on August 15, 1951, of the balance of any moneys due Buyer from Seller on that date on account of the loan referred to in this Section 14, such guaranty to be in form satisfactory to

Buyer. Seller shall pay interest on the balance of Principal of such loan remaining from time to time unpaid, at the rate of 3¼% per annum, from the date of such loan. In the event such loan is made, same shall be repaid as follows:

In each monthly accounting made by Buyer to Seller, Buyer shall deduct from the moneys provided to be paid over by Buyer to Seller the sum of five cents (5¢) for each pound of shrimp covered by such accounting (as provided in Item III of sub-paragraph (b) of Section 11 of this agreement), and credit same first to interest and the balance to principal remaining from time to time unpaid on such loan, until the principal of such loan shall be reduced to Twenty-one Thousand Two Hundred Fifty Dollars ($21,250). After the principal of such loan has been reduced to Twenty-one Thousand Two Hundred Fifty Dollars ($21,250), Buyer shall not make any further deductions to be applied on the payment of such loan, but such sum of Twenty-one Thousand Two Hundred Fifty Dollars ($21,250), together with interest due thereon, shall be paid by Seller to Buyer on or before August 15, 1951.

In the event such loan of Sixty-eight Thousand United States Dollars ($68,000) is not made by Buyer to Seller within five (5) days after Nacional Financiera, S. A., has agreed to guarantee the same, as
153 hereinabove provided, this contract shall, at the option of Seller, become null and void and of no further force or effect.

15. Buyer agrees that Seller or its agents may, at any and all reasonable times during the term of this agreement and for sixty (60) days thereafter, have access, during business hours, by a duly authorized representative or representatives, to any and all books and records of Buyer which in any way pertain to the subject matter of this agreement, including (without in limitation thereof) the sale by Buyer of the shrimp purchased by it from time to time hereunder, the expenses and charges incurred by Buyer, and any and all expenses and charges incurred by Buyer, and any and all other items of income or expenditure in any way connected with the shrimp sold hereunder.

16. Buyer agrees that throughout the term of this agreement, and any and all renewals thereof, it will not

sell, distribute or otherwise dispose of any shrimp imported or shipped from Mexico other than shrimp purchased hereunder, either directly or indirectly, anywhere within the United States of America or the Dominion of Canada, without the prior written consent of Seller first obtained; provided, however, that in the event that during the period commencing November 1, 1950, and ending May 31, 1951, the Seller does not ship in any two succeeding calendar months included in such period, without fault on the part of the Buyer, at least eight (8) carloads of shrimp, the Buyer shall not be restricted during the month succeeding the last of two months, in selling, distributing or otherwise disposing of shrimp imported or shipped from Mexico which have not been purchased from the Seller and the Buyer shall, in such event, have the right to terminate this contract provided it notifies the Seller in writing of the exercise of such right within ten (10) 154 days after the end of the two month period in which the Seller does not ship eight (8) carloads of shrimp, as hereinabove provided.

17. Seller agrees that Buyer shall have the right, at its expense, to station a duly authorized representative of Buyer in Seller's plant in Mazatlan, Sinaloa, Mexico, throughout the term of this agreement, to examine and spot check not to exceed ten (10) five-pound packages selected out of each shipment of shrimp sold to Buyer. Such examination and spot-check may include completely thawing, weighing, counting and scrutinizing the shrimp in the packages so selected.

18. The first contract year under this agreement shall expire on August 15, 1951, and each succeeding year (if any) shall be from August 16th, to the succeeding August 15th. The parties hereto agree that this agreement shall be deemed to be automatically renewed by the parties hereto for each successive contract year, and from year to year thereafter, with all appropriate changes in dates to fit each successive contract year, in the absence of notice by either party to the other given not later than March 1, 195 and if renewed, not later than March 1st of any calendar year thereafter, to the effect that this agreement shall not remain in effect for successive contract years.

19. Any and all notices or reports to be given under this agreement shall be deemed validly given or served if sent by registered mail, postage and registration fee prepaid,

or by telegram, and addressed as follows (in the absence of notice duly given hereunder of change of address):

To Buyer:

Penguin Frozen Foods, Inc.
333 South State Street
Chicago, Illinois
Attention: Henry Appelbaum.

155 To Seller:

Refrigeradora Del Noroeste, S. A.,
Mazatlan, Sinaloa, Mexico.

Any notice or report so mailed or telegraphed shall be deemed to be delivered on the date when the same is mailed or telegraphed, as aforesaid.

20. In the event that any date referred to in this agreement shall fall on a Sunday or on a day which is a legal holiday either in the Republic of Mexico or the United States of America, said date shall be automatically deemed to be the next succeeding business day.

In Witness Whereof The parties hereto have caused this agreement to be signed in their respective names their respective officers thereunto duly authorized, and their respective seals to be hereunto affixed, the day and year first above written.

Refrigeradora Del Noroeste, S. A:
By .....
President.

Penguin Frozen Foods Inc.
By .....
President.

Attest

.....
Secretary.

156 PLAINTIFF'S EXHIBIT NO. 2.

(Filed Mar. 12, 1956. Roy H. Johnson, Clerk.)

Mexico, D. F., 21 de Julio de 1952

Penguin Frozen Foods
120 South La Salle Street
Chicago 3, Ills.

Muy señores nuestros:

De acuerdo con las conversaciones que hemos venido teniendo con su Representante Sr. Henry Appelbaum, manifestamos a ustedes que estamos conformes en prorrogar nuestro contrato de Venta de Camaró a esaempresa, dejando sin efecto lo carta de febrero último en que cancelába mos dicho contrato, y prorrogandolo per tres años más en las mismas condiciones, únicamente con las siguientes modificaciones.

a).—El precio a que se venderá el camarón a la Penguín Frozen Foods será al 95% de los precios vigentes en el mercado, en lugar del 93%, durante la próxima temporada.

b).—El precio a 95% será siempre y cuando Penguín Frozen Foods no dé ningún adelanto en dinero a Reno, y esta última financió con sus propios recuress o con créditos no proveniente de Penguin Frozen Foods su operación.

c).—En caso de que Reno no pudiera financiar directamente u obtener financiamiento fuera de Penguin Frozen Foods,—ésta daria el financiamiento, pero en ese caso el precio de venta sería el de 93%.

d).—Para que la Penguín Frozen Foods pudiera comprar camarón a otros productores distintos de Reno. requeriría la aprobación previa de esta última empresa.

Sin otro particular, nos es grato quedar sus afmos. attos. y Ss. Ss.

"Refrigeradora Del Noroeste", S. A.

Conforme:

.....

Penguin Frozen Foods.
JSA/agp.

157 **PLAINTIFF'S EXHIBIT NO. 3.**

(Filed Mar. 12, 1956. Roy H. Johnson, Clerk.)

July 22, 1952

Penguin Frozen Foods
120 South La Salle Street
Chicago 3, Illinois
USA

Dear Sir:

In agreement with the conversations which we have had with your representative Mr. Henry Appelbaum, we declare to you that we comply with extending our contract of the sale of shrimp of October 19, 1950 with that firm (ie Penguin Frozen Foods,) for a term of two years, being able to be newly extended at the will of both parties, retaining the same specified conditions in the mentioned contract, only with the following modifications:

a)—the price at which shrimp will be sold to Penguin Frozen Foods will be at 95% of the prices in force, during the next period.

b) the price at 95% will be always when Penguin Frozen Foods does not give and advance in money to Reno and this last finances with its own resources or with credits not proceeding from Penguin Frozen Foods their transaction.

c)—In the case that Reno can not finance directly or obtain financing outside of Penguin Frozen Foods, the latter will finance, but in this case the price of sale would be 93%.

d)—If Penguin Frozen Foods should buy shrimp from other producers distinct from Reno, it requires the prior approval of this last firm.

Without any other matter, we remain

Sincerely Yours,

Refrigeradora Del Noroeste, S. A.

Agreement

Penguin Frozen Foods

158 PLAINTIFF'S EXHIBIT NO. 4.

(Filed Mar. 12, 1956. Roy H. Johnson, Clerk.)

Western Union

1953 Feb 25 PM 10 52

DA850

D.SAA499 67 NL PD-SA Mexico City Mex 25—

Penguin Frozen Foods Inc Attn Henry Appelbaum—
120 South LaSalle St Chgo—

By resolution of our board of directors and in accordance with our contract with you signed on October 19th 1950 you are hereby notified that it is our will to terminate such contract Stop You will please take note that said contract in accordance to its clauses will thus end on August 15th 1953 Stop Awaiting your acknowledgment of receipt of this notice we remain yours truly—

Refrigeradora del Noroeste SA.

159 PLAINTIFF'S EXHIBIT NO. 5.

(Filed Mar. 12, 1956. Roy H. Johnson, Clerk.)

Confirmation Copy to be Mailed

CS Feb 26 309P Mex 20 PD (copy)

Refrigeradora del Noroeste SA
Avenido Francisco 1 Madero Eje Oriente 507 Dep 510
Edificio
San Antonio Mexico DF Mex

In reference to your telegram per supplemental agreement signed July 22 1952 contract is not subject to cancellation until 1954

Penguin Frozen Foods Henry Appelbaum

DE 2-6683

Penguin Frozen Foods 120 South LaSalle Rm 842
Copied NB

PLAINTIFF'S EXHIBIT NO. 6.

(Filed Mar. 12, 1956. Roy H. Johnson, Clerk.)

Refrigeradora Del Noroesta, S. A.
Mazatlan, Sinaloa, Mexico

July 17, 1953.

Mr. Henry Appelbaum,
Hotel Balmer,
Mazatlan, Sin.
Mexico.

Dear Henry:

This will confirm the conversations we have been holding during your visit to this city.

To begin with, we shall do our best to obtain for your Company, Penguin Frozen Foods, in the territory where you are located, the Representation of the new organization that will handle our production, and that of various other Mexican Plants, from October 1953, on. You realize of course, that such decision, on the part of the new organization, will have to be based, not only on the final results of your operation with us, but also on the general policy to be decided by its Board of Directors.

We are to send you, at the earliest possible moment, a detail of the differences found in your accounts by our Mr. Sergio Infante, during his visit to your offices this last February, and if Mr. Infante's figures are correct, you are to credit our account with the sum of said differences.

Our Board is concerned with the large inventory of unsold shrimp now in Chicago, and in view of the termination of our contract, we would very much appreciate your advise in writing, to the attention of our Board, as to which are your ideas for the sale of said inventory.

Getting back to the possibility of your handling, in your territory, the products of the new organization to which we now belong, the President of same Mr. John W. Willis, and the writer, will either contact you, or call on you, to

discuss a possible agreement, as soon as the general policy of the new Company is decided by its members.

It was nice seeing you in Mazatlan, and we remain,

Sincerely yours,

/s/ Pedro L. Pinson,
President.

Delivered by Hand. PLP/yg.

161 PLAINTIFF'S EXHIBIT NO. 7.

(Filed Mar. 12, 1956. Roy H. Johnson, Clerk.)

Western Union

LA867 193 Aug 20 AM 12 13

L.TSB063 134 NL PD– NJ Mazatlan Sin Mex Viz FedMex 19–

Henry Appelby baum– Penguin Frozen Foods
120 South LaSalle St Chgo–

Reference todays phone conversations will appreciate your wiring us reasons your not taking bid received through Willis for total inventory thirty one forty twos specially when you told us you made sale of thirty thousand pounds same size at two cents below Willis bid Stop As you stated over phone today that you are stopping all further sales we advise you such attitude your part may considerably damage our already affected interests if market continues decline Stop Consequently repeat our offer immediately disposal total inventory to Cresst Importing Co as only way relieving you your actual obligations Bank America and terminate amiably our business relations Stop Under such bases Willis will gladly discuss with you in Chicago shortly possibility your have sub brokerage arrangement with Crest as indicated in our letter of July Seventeenth–

Pedro L Pinson–

162 PLAINTIFF'S EXHIBIT NO. 8.

(Filed Mar. 12, 1956. Roy H. Johnson, Clerk.)

Confirmation Copy

HZ Mex 81 NL PD Aug 20 1953 428P

Pedro Pinson

Refrigeradora del Noroeste SA Mazatlan Sin Mex

Regarding your telegram received August 20th conclusively proves your intention to wash me out of the picture in violation of your contract not withstanding my great service and contribution. I am not interested in any piece meal settlement. I intend to protect our company against your obvious moves to repudiate your obligations, when you are prepared to keep your repeated promises to send authorized representatives to Chicago I am willing to do everything I can to work out an amiable solution

Henry Appelbaum Penguin Frozen Foods

DE 2-6683 Sub 120 So LaSalle St RA

163 PLAINTIFF'S EXHIBIT NO. 9.

(Filed Mar. 12, 1956. Roy H. Johnson, Clerk.)

(21)

Western Union

DA523 1953 Aug. 24 PM 4 54

DSAA851 65 PD-SA Mexico DF Mex 24 343PMC-

Penguin Frozen Foods-

120 South LaSalle St Chgo-

ReTel surprised tone you use which consider totally uncalled for Stop There is no violation our contract which was duly and legally cancelled Stop We do not wish start unconstructive polemic thus and in accordance clause thirteen shall appreciate your closing accounts advising us at once of final figures which shall be duly verified by authorized representative so that inventory can immediately be disposed of-

Refrigeradora del Noroeste SA-

164 PLAINTIFF'S EXHIBIT NO. 10.

(Filed Mar. 12, 1956.)

Western Union

To Refrigeradora del Noroeste SA August 25, 1953
Street and No. Avenue Juarez 64 – Desp 105
Care of Edificio San Antonio Place Mexico D F Mexico

Competent Counsel have advised us our contract is in full force and effect until August 15, 1954 Again urge that you send authorized representative as you have often promised to do so that we can negotiate amicable settlement

Penguin Frozen Foods

165 PLAINTIFF'S EXHIBIT NO. 11.

(Filed Mar. 12, 1956. Roy H. Johnson, Clerk.)

Western Union

To Refrigeradora del Noroeste S A August 28, 1953
Street and No. Avenue Juarez 64 Desp 105
Care of Edificio San Antonio Place Mexico D F Mexico

I do not intend to continue a pointless exchange of telegrams Stop At your request I came and stayed two weeks in Mexico with no results Stop I now insist that you keep your commitment to send authorized representatives to Chicago

Henry Appelbaum—Penguin Frozen Foods

166 **PLAINTIFF'S EXHIBIT NO. 12.**

(Filed Mar. 12, 1956. Roy H. Johnson, Clerk.)

October 3, 1953

Penguin Frozen Foods,
120 South La Salle,
Chicago, Illinois.

Dear Sirs:

Herewith enclosed you will find copy of our today's were, whose contents are self explanatory, and which reads as follows:

"This is to advise you that board directors this company at meeting—held yesterday confirmed the extension letter nineteen fifty two Stop Therefore contract remains in full force and vigor and directors hereby request payment to Bank America on or before Wednesday October seventh nineteen fity three of all sums due as result your sales todate our shipments Stop Anticipate shipping first car around October nineth this simultaneously payment Bank America open letter credit to cover this first shipment stating market prices all sizes accordance our contract."

We thus await the payment as requested, and you must fully realize that the retention by you of the funds due us has caused so far grave damage to our company, and any further delay could result in our financial failure.

Very truly yours,
Refrigeradora Del Noroeste, S. A.

167 PLAINTIFF'S EXHIBIT NO. 13.

(Filed Mar. 12, 1956. Roy H. Johnson, Clerk.)

October 6, 1953.

Refrigeradora del Noroeste, S.A.
Avenue Juarez 64 Desp. 105
Edificio San Antonio
Mexico, D.F. Mexico

Gratifying at long last to have your acknowledge your responsability under our contract together with statement of your intention to perform. Inasmuch as you specify use of letters of credit assume you are returning to sever precent commission arrangements. All this quite agreeable however in light of my recent experiences I am entitled to adequate security for your performance. Puzzled by your direction of only one letter of credit when heretofore you have requested five or more at the opening of season. Nevertheless letter credit opened Banco Occidental at the following prices Reno U 10 88¢, U 15 85¢, 16 20 75¢, 21/25 70¢, 26/30 60¢, 31/42 50¢ peeled 60¢ Sunny brand three cents less per pound and all other brands five cents less per pound.

Henry Appelbaum—Penguin Frozen Foods.

168 PLAINTIFF'S EXHIBIT NO. 14.

(Filed Mar. 12, 1956. Roy H. Johnson, Clerk.)

October 7, 1953

Penguin Frozen Foods
120 South La Salle
Chicago, Ill.

Commercial relations renewed under original contract and extension, your cable omits confirmation that required payment according to our previous cable has been made. We categorically demand it.

Refrigeradora Del Noroeste S. A.

169 PLAINTIFF'S EXHIBIT NO. 15.

(Filed Mar. 12, 1956. Roy H. Johnson, Clerk.)

October 8, 1953

Refrigeradora Del Noroeste, S.A.
Ave. Juarez 64 Desp. 105
Edificio San Antonio
Mexico, D.F. Mexico

We will continue to remit for cars as completely sold out in accordance with past practise so long as you live up to your agreement.

Henry Appelbaum,
Penguin Frozen Foods.

170 PLAINTIFF'S EXHIBIT NO. 16.

(Filed Mar. 12, 1956. Roy H. Johnson, Clerk.)

Your failure to comply with our wire of October third and pay over to us or to First National Bank Chicago for our account the amount you owe for shrimp sold by you is most serious breach of contract on your part and we refuse to send you any more shrimp for resale by you in USA Stop We demand that you promptly deliver to First National Bank Chicago for our account all warehouse receipts covering unsold shrimp sent to you by us and we demand that you immediately pay same bank the balance you now owe which you stated our attorney Collenburg on October fourteenth as being approximately one hundred and forty thousand dollars.

Refrigeradora Del Noroeste, S.A.

171 PLAINTIFF'S EXHIBIT NO. 17.

(Filed Mar. 12, 1956. Roy H. Johnson, Clerk.)

From Sprecher Letter of Dec. 22, 1954.

The June 30, 1953 report from Penguin to Reno is the first report covering cars Nos. 31-38, inclusive. Cars Nos. 32 and 36 were reported sold out in the December 31, 1953 report. Cars Nos. 31, 33, 34, 35, 37 and 38 were reported sold out in the February 28, 1954 report. Thus Reno is credited as follows:

Car	Credit Reno	Document Reference
31	$ 28,189.30	Feb. 28, 1954 report
32	26,385.50	Dec. 31, 1953 report
33	22,437.20	Feb. 28, 1954 report
34	24,315.56	Feb. 28, 1954 report
35	23,303.35	Feb. 28, 1954 report
36	29,893.94	Dec. 31, 1953 report
37	37,600.80	Feb. 28, 1954 report
38	29,723.94	Feb. 28, 1954 report
Total—	$221,849.59	

The five per cent (5%) commission due to Penguin on $221,849.59 is $11,092.45.

The expenses chargeable to Reno are as follows:

Expenses Chargeable to Reno	Document Reference
$ 3,727.20	June 30, 1953 report
1,696.35	July 31, 1953 report
1,829.04	August 31, 1953 report
745.80	September 30, 1953 report
502.62	October 31, 1953 report
443.01	November 30, 1953 report
270.17	December 31, 1953 report
173.02	January 31, 1954 report
38.25	February 28, 1954 report
Total— $ 9,425.46	

However, in accordance with the June 30, 1953 report, Penguin as of June 30, 1953, paid Reno the amount of $3,816.81. This included the following items:

Amount due Reno	$11,312.71	($2,446.80 of which applied to Cars Nos. 31-36, inclusive.)
Less: Commission	3,768.70	($1,358.29 of which is commission on sales of Cars Nos. 31-36, inclusive.)
	$ 7,544.01	
Less: Expenses	3,727.20	
Amount Paid—	$ 3,816.81	

172 Therefore, because of the above payment, the previously computed figures must be adjusted as follows:

	Reno Credit	Penguin Commissions	Expenses Chargeable to Reno
	$221,849.59	$ 11,092.45	$ 9,425.46
Less:	2,446.80	Less: 1,358.29	Less: 3,727.20
	$219,402.79	$ 9,734.16	$ 5,698.26
Credit Reno—			$219,402.79
Less: Commissions—			9,734.16
			208,668.63
Less: Expenses—			5,698.28
			202,970.37
Less: Expense (Items appearing in October 31, 1953 report)			
Breading (at cost)—		$3,205.62	
Breading, freight & customs—		663.16	
Deveining machine—		149.00	
Hamilton supplies—		798.78	4,816.56
			$198,153.81

173 PLAINTIFF'S EXHIBIT NO. 18.

(Filed Mar. 12, 1956. Roy H. Johnson, Clerk.)

PENGUIN FROZEN FOODS

Statement of Amount Due "Reno"
March 15, 1954

Sales:			
Cars numbered 31 through 38		221,849.59	
Less amount advanced at July 15, 1953		2,446.80	219,402.79
Cars numbered 29 through 30 (after June 30, 1953)			13,926.70
Storage and handling:			
Amount charged "Reno" in excess of amount paid for the period from February 28, 1953, to February 28, 1954			1,136.78
Rebate of 12½% on charges for the 2 years ended October 31, 1952			2,992.96
			237,459.23
Less:			
Commissions at 5%:			
Cars numbered 31 through 38	11,092.47		
Less amount drawn at July 15, 1953	1,358.30	9,734.17	
Cars numbered 29 through 30		696.33	
Expenses—June 30, 1953, through February 28, 1954		5,698.26	
Inventory advances at July 15, 1953—cars numbered 29 through 30		13,546.08	29,674.84
Amount due "Reno"—March 15, 1954			207,784.39

174 PLAINTIFF'S EXHIBIT NO. 19.

(Filed Mar. 12, 1956. Roy H. Johnson, Clerk.)

Penguin Frozen Foods.,

Statement of Amounts Due "Reno" and Amount of Interest on Said Amounts Computed to June 6, 1955.

Date Due	Amount Due	Amount of Interest
5/15/51	$ 767.77	$ 22.40
12/15/51	1,023.22	25.58
6/15/52	1,645.25	68.55
4/15/53	2,066.61	8.61
5/15/53	3,761.76	15.67
6/15/53	3,966.08	16.53
7/15/53	14,863.19	61.93
8/15/53	74,144.00	308.93
9/15/53	134,806.06	561.69
10/15/53	160,005.09	666.69
11/15/53	175,228.95	730.12
12/15/53	187,176.05	779.90
1/15/54	197,813.05	824.22
2/15/54	201,374.03	839.06
3/15/54	207,784.39	12,726.76
	Total	17,656.64

Interest computed at 5% from date due to June 6, 1955.

175 PLAINTIFF'S EXHIBIT NO. 19-A.

(Filed Mar. 12, 1956. Roy H. Johnson, Clerk.)

Reno *vs.* Appelbaum.

Statement of Credits Due Plaintiff from Defendant With Interest at 5% Thereon Computed to June 15, 1955.

Date Credit Accrued	Amount	Amount of Interest
7/15/53	$ 11,173.10	$ 46.55
8/15/53	70,619.52	294.25
9/15/53	131,131.46	546.38
10/15/53	156,218.06	650.91
11/15/53	167,242.18	696.84
12/15/53	178,328.07	743.03
1/15/54	188,920.25	787.17
2/15/54	192,463.27	801.93
3/15/54	198,838.09	12,427.38
	Total Interest	$16,994.44

176 PLAINTIFF'S EXHIBIT NO. 20.

(Filed Mar. 12, 1956. Roy H. Johnson, Clerk.)

Hotel Bamer
Mexico

July 22, 1953.

Sr. Pedro L. Pinsón

Dear Pedro:

In reply to your request of my opinion on what to do with the small shrimp in the present inventory. I refer you to our letter of July 17, 1953, in which we show the—inventory and sales of the week ending on same date together with Bob's comments regarding present market.

As of now this information is all that I have. Having been away from my office for ten days.

At present the amount of small shrimp produced is very great and the market is very sloppy.

While I prefer to wait until I return to Chicago to study the situation more thoroughly, my opinion at the present time would be, we can not lose much by holding, and may have much to gain.

The situation in the shrimp industry changes daily, as you know and we should take advantage of bright spots in the market.

I trust this information will be of assistance to you.

Do not hesitate to call on me for further information or discussion.

Respectfully,
Henry Appelbaum,
Penguin Frozen Foods.

177 PLAINTIFF'S EXHIBIT NO. 21.

(Filed Mar. 12, 1956. Roy H. Johnson, Clerk.)

August 6, 1953.

Refrigeradora del Noroeste S A
Vincente Guerrero 108 Oriente
Mazatlan Sin Mexico

Gentlemen:

This is in reply to your letter of July 20th, which I shall answer paragraph by paragraph. I am sure that the following will clarify many of the questions in your mind.

Freights 1951-1952. During this season we charged you $18,177.72. Sales outside of Chicago and sold FOB destination amounted to 1,253,631 pounds at an average rate of 1.25 (including ice and salt) which equals $15,670.39. This leaves $2,507.33 which is accounted for as follows: Additional freight on returned merchandise shipped out of town amounted to approximately $1,025.10. This is composed of merchandise returned from invoices Nos. 625-644 and 815 at an average rate of 2¢ per pound. (The rate of 1.25 which we have been able to secure on most of our shrimp is lower than the rate given any other shipper and the rate between eastern cities is much higher than that from Chicago to the East.)

Additional icing charges on 50 cars received in 1951-52 amounted to approximately $20.00 per car or $1,000.00.

On invoices Nos. 842-855-858 and 859 sold to Paul Stamm & Company. There was a freight allowance of 1.25 per cwt plus ice and salt amounting to $808.28. This allowance was given because the shrimp were shipped to the South Eastern United States and we refused to pay the entire freight rate. You will note that this merchandise was sold at a time when we were stuck with a lot of Sunny U/15s and at a price 1¢ more than we were getting from any of the large wholesalers. Adding all of these together you will find that there is even a slight undercharge indicated, especially since Federal Tax is not even included.

Freight 1952-53 season—thru February 1953.

For the 1952-53 season thru February 1953 you were charged $9,020.97. Per a transportation audit by the Insurance Company it was determined that 530,742 pounds were shipped by truck from October 1, 1952 to February 28, 1953. This at an average rate of 1.25 (includes ice and salt) equals $6,634.27. 82,618 pounds were shipped during this period via railroad. This at 1.25 (including ice and salt and added weight of cartons and ice) equals $1,032.72. Icing of 20 cars at approximately $15.00 per car equals $300.00. (This is less per car than the 1951-52 season because the cost increases greatly on cars arriving in the summer months.)

178

Now, as to the $1,417.22 which remains unpaid to the railroads and for which we have charged you. We are being sued by the railroad for this amount plus charges and legally we (meaning you) are liable for the entire amount.

However, in your behalf we appealed to the Interstate Commerce Commission for a different interpretation of the law. The unloading of the entire car in St. Louis did occur on the car involved in the smallest of the three suits, but has not been used as a legal issue by the railroad. Rest assured that just as soon as a decision is reached, if it be in our favor, full remittance will be made (and please note, all legal fees incurred herein have been borne by us).

Adding all these items gives a total of	$6,634.27	
	1,032.72	
	300.00	
	1,417.22	$9,384.21

Not including Federal Tax, which again indicates a slight undercharge. Also, if you will check all the invoices, you will find that in a majority of cases the price secured for shrimp sold FOB destination is higher than that sold FOB Chicago.

Another point that we have discussed several times and I would like to emphasize again is that if you would send all your freight bills to Chicago, we would turn them over to the Railroad Auditing Company. This Company is only paid a percent of the amount of money saved by their client, and we are of the opinion that such an audit might result in some refunds by the Railroads. At the worst, you would have nothing to lose and everything to gain.

Storage Charges 1951-52 Season.

For storage in 1951-52 we charged you $21,139.63, and taking all incoming shrimp at 49¢ per cwt. and all remaining inventory at the end of each month at 25¢ per cwt. amounts to $18,599.80. (Using your figures) this leaves $2,539.85 which is accounted for as follows:

179 There is a charge by Cold Storage of 50¢ per lot per withdrawal), which at an average of 10 lots per car and 5 withdrawals per lot (this is a conservative estimate) amounts to $1,250.00.

Also, there is at least a delay of several days between the pick up or shipping date and the date of the invoice. This is unavoidable as delivery is requested on a specific date, yet the merchandise must be invoiced immediately to keep our records straight. A very minimum estimation of additional storage charges due to this lapse of time would be $500.00.

To add to this, there is an additional charge of 4¢ per cwt. for handling and 5¢ per cwt. for storage on all lots under 2,000 pounds. Assuming that only 10% of the shrimp received and held in storage were in lots of 2,000 pounds or less (also an extremely conservative figure) this would also increase charges by approximately $500.00.

Returned merchandise with the added charges for handling not included elsewhere more than compensated for the 10% 'X' lotting privilege granted by Chicago Cold Storage to us, which is 1951-52, was utilized on about half the cars. And bear in mind, 'X' lots carry an added handling charge.

Taking Federal Tax into consideration brings us to within a few dollars of the amount charged to Reno for this season.

Season 1952-1953.

For the 1952-53 season, the 50¢ charge for each withdrawal per lot, the additional charge on small lots, plus handling charge on returned merchandise and Federal Tax are not taken into consideration in Sr. Infante's report in which he finds $1,459.12 unaccounted for. Also if you will check the report for March, you will find that a credit on storage for $1,442.98 was issued to you based on an audit of storage charges to February 28, 1953.

Transit Insurance.

Mr. Infante's calculations are correct on this item and we are expecting a refund approximately of $1,300.00 in the very near future.

180 Interests.

To begin with, on the matter of interest charges by the Bank at Mazatlan for late payments on the drafts for 75% of invoice value, commencing with the 1951-52 season all drafts were paid on the day they were presented to us by the bank in Chicago. Inspection by the Pure Food and Drug Administration was waived by us at that time, and the only delay was due to mailing time between Mexico and Chicago. For the season 1950-51, payment was made immediately upon receipt of inspection and acceptance by U. S. Pure Food and Drug Administration which was as per our contract.

In addition to this, there was no interest charged Reno from October 1950 to February 1951 on the money owed to Penguin. I am sure that if all this is taken into account you will find that the 50% of $14,391.82 Mexican currency is more than compensated for.

As for the charge to you for the bank expenses on opening letters of credit, it was understood that all purchasing expenses were to be borne by you and all selling expenses borne by us. The cost of opening letters of credit is without a doubt a purchasing expense and bears no relationship whatsoever to the selling function and therefore is not our responsibility. (Reference your letter dated Octo-

ber 19, 1950.) It is significant in itself that no claim concerning this matter was manifested until over a year after the contract was in force.

Now, as to the charges by the Bank of America on the advances to you during the 1952-53 season. To begin with, there is a two weeks lapse of time between the date of shipment and the date we can unload a car. Assuming the average advance on the 30 cars to be $25,000.00 at 4% per year, the interest during these 14 days, during which we have control over the cars, would amount to $40.00 per car or $1,200.00. And this is assuming that the cars are sold out completely immediately upon arrival.

Aside from this, it was the understanding from your letter dated July 22nd, 1952 in which the commission was reduced from 7% to 5%, that in return, we were to be completely absolved from the financing responsibility. While the understanding was that we would pay the bank when we were paid, there was not one car out of the 30 that was not paid long before we received our money for it and long before the due date. Moreover, if you will check your
181 records, I sincerely doubt if you will find more than a few cases where we failed to pay the bank for any car before it was completely sold out.

To repeat myself, if you will review your letter dated July 22, 1952, you will see that the only thing we gained by giving up 2% commission was the absolved responsibility for financing and the necessarily connected interest charges.

The preceding is confirmation of my discussion with Sr. Sergio Infante in Mexico and I hope that it clarifies all points contained in your letter to your entire satisfaction.

In addition, I am sure that if you are interested in a complete audit of our records, you will find that there are many expenses incurred on Reno's behalf which have not been charged to you.

We will be more than glad to furnish any further information which you may desire.

Sincerely,
Penguin Frozen Foods,
Henry Appelbaum.

c.c. Lic. Ostos
c.c. Sr. Fraustro

182 PLAINTIFF'S EXHIBIT NO. 22.

(Filed Mar. 12, 1956. Roy H. Johnson, Clerk.)

Penguin Frozen Foods
DEarborn 2-6683—2-6684
120 South LaSalle Street Chicago 3, Illinois

June 19, 1953

SR. Pedro Pinson
Refrigeradora del Noroeste S A
Mazatlan Sin Mexico

Dear Pedro:

Our inventory thru car No. 35 PFE 47048 is as follows:

1,000	lbs.	Reno		U/15	900	lbs.	Nore	1st	U/15
5,300	"	"		16/20	3,950	"	"	"	16/20
2,350	"	"		21/25	26,650	"	"	"	21/25
945	"	"		26/30	26,545	"	"	"	26/30
3,500	"	"		31/42	74,490	"	"	"	31/42
16,670	"	"		Peeled	55,000	"	"	"	43/65
1,350	"	Sunny		U/10	100	"	"	2nd	U/10
2,100	"	"		U/15	4,890	"	"	"	16/20
3,450	"	"		16/20	8,800	"	"	"	21/25
1,600	"	"		21/25	9,950	"	"	"	26/30
500	"	"		26/30	10,250	"	"	"	31/42
650	"	"		31/42	250	"	"	"	43/65

TOTAL 259,190 lbs.

Sales for the week ending June 19, 1953 are:

250	lbs.	Reno	U/10	@ 1.15	2,040	lbs.	Nore	1st	U/15	@	1.05
50	"	"	U/10	1.20	2,250	"	"	"	16/20		.85
200	"	"	16/20	.90	600	"	"	"	21/25		.80
558	"	"	0/66	.50	750	"	"	"	31/42		.65
				12 oz.	1,150	"	"	2nd	U/15		1.03
150	"	Sunny	U/10	1.17	500	"	"	"	U/15		1.05
50	"	Nore 1st	U/15	1.05							

TOTAL 8,548 lbs.

Peeled shrimp are running very small and still short weight in boxes. We have had several cancellations, and we will have to lower our price as there is no demand for this size small shrimp.

We got by with a lot, but on a good market that is what is to be expected. Since the market has taken a nose dive, they are getting particular as all hell. We are selling in small lots only, in order to get as much as we can for
183 the larger sizes, as you will notice.

Fishing in Louisiana closes on Sunday June 21st,

and I hope the small sizes will be in demand, at least regardless of price. We hope we will get a demand so we can sell some as the biggest bulk of our inventory right now is in 31/42s and 43/65s. I think all in all we came out exceptionally well on all of the other sizes.

You will notice one sale of shrimp at $1.20 and $1.17, don't use this as a barometer for prices on shrimp, but we had to use a little pressure on this customer as it was the last of the U/10s that we had. We may still have to give him a 5¢ rebate on them—but hope not.

Yours very truly,

Penguin Frozen Foods,

Henry Appelbaum.

cc-Fraustro

P. S. What about the small sizes in 12 ounce packages? Have you packed any?

184 PLAINTIFF'S EXHIBIT NO. 23.

(Filed Mar. 12, 1956. Roy H. Johnson, Clerk.)

Penguin Frozen Foods
DEarborn 2-6683—2-6684
120 South LaSalle Street Chicago 3, Illinois

July 3, 1953

Sr. Pedro Pinson
Refrigeradora del Noroeste S A
Mazatlan Sin Mexico

Dear Pedro:

Our inventory thru car No. 37 PFE 68262 is as follows:

550	lbs.	Reno		U/10	5500	lbs.	Nore 1st	16/20
1700	"	"		U/15	20450	"	" "	21/25
2050	"	"		16/20	23295	"	" "	26/30
1600	"	"		21/25	76090	"	" "	31/42
3400	"	"		31/42	61050	"	" "	43/65
1134	"	"	12 oz.	26/30	1100	"	" 2nd	U/10
3294	"	"	"	31/42	1600	"	" "	U/15
2034	"	"	"	43/65	2200	"	" "	16/20
2200	"	Sunny		U/10	8045	"	" "	21/25
1050	"	"		U/15	10550	"	" "	26/30
400	"	"		16/20	12600	"	" "	31/42
100	"	"		26/30	400	"	" "	43/65
1700	"	Nore 1st		U/10	16323	"	Reno	Peeled
4000	"	"	"	U/15				

TOTAL 264,415 lbs.

Sales for the week ending July 3rd, 1953 are:

500	lbs.	Reno		U/10	@ 1.16	1100	Nore	1st	U/15	@ 1.05
50	"	"		U/15	samples	100	"	"	16/20	.85
100	"	"		16/20	.90	350	"	"	"	.88
1600	"	"		"	.95	1350	"	"	"	.90
1000	"	"		21/25	.86	1000	"	"	31/42	.64
500	"	"		26/30	.81	11000	"	"	21/25	.85
5250	"	"		Peeled	.63	500	"	"	26/30	.78
7767	"	"		"	.64	3000	"	"	"	.80
90	"	"		"	.65	250	"	"	31/42	.66
36	"	"	12 oz.	26/30	.74⅔	500	"	"	43/65	.50
1440	"	"	"	31/42	.70⅔	100	"	2nd	U/10	1.05
1740	"	"	"	"	.72	700	"	"	U/15	1.03
2000	"	Sunny		U/15	1.05	800	"	"	16/20	.84
400	"	"		16/20	.92					
200	"	"		21/25	.87					

185

Credit Memo 100 lbs. Sunny 26/30 @ 77¢
Credit Memo 100 lbs. Nore 1st 16/20 @ 84¢
Credit Memo 100 lbs. Nore 1st 31/42 @ 63¢

TOTAL SALES 43,293 lbs.

Note: The correct total on inventory last week should have been 263,552 instead of 363,552 as reported.

The market is firm on all but the small sizes, which are still draging.

I will arrive in Mexico July 13th and will leave Mexico City for Mazatlan shortly thereafter.

Would appreciate your letting us know what the code number on Reno Brand shrimp was at the National Fisheries Institute Convention.

Yours very truly,

Penguin Frozen Foods,
Henry Appelbaum.

c.c. Fraustro

186 PLAINTIFF'S EXHIBIT NO. 24.

(Filed Mar. 12, 1956. Roy H. Johnson, Clerk.)

Penguin Frozen Foods
DEarborn 2-6683—2-6684
120 South LaSalle Street Chicago 3, Illinois

August 7, 1953

Sr. Pedro Pinson
Refrigeradora del Noroeste S A
Mazatlan Sin Mexico

Dear Pedro:

Our inventory thru car No. 38 PFE 7754 is as follows:

2840	lbs.	Reno		3180.80	U/10—1.18	1995	lbs.	Nore	1st	16/20—	.70—	1396.50
3420	"	"		1881.00	31/42—0.55	17920	"	"	"	21/25—	.60—	10752.00
15840	"	"		9504.00	Peeled—0.60	23045	"	"	"	26/30—	.55—	12674.75
7	"	"	12 oz.	4.55	21/25—0.65	72400	"	"	"	31/42 —	.46—	33304.00
786	"	"	"	471.60	26/30—0.60	61320	"	"	"	43/65—	.40—	24528.00
2339	"	"	"	1286.45	31/42—0.55	100	"	"	"	0/66—	.30—	30.00
8835	"	Sunny		9718.50	U/10—1.10	815	"	"	2nd	U/10—	1.00—	815.00
480	"	"		360.00	16/20— .75	2270	"	"	"	U/15—	.95—	2156.50
10	"	"		6.30	21/25— .63	4250	"	"	"	16/20—	.70—	2975.00
150	"	"		87.00	26/30— .58	9200	"	"	"	21/25—	.55—	5060.00
10	"	"		5.00	31/42— .50	10395	"	"	"	26/30—	.50—	5197.50
290	"	Nore	1st	319.00	U/10—1.10	11920	"	"	"	31/42—	.46 —	5483.20
1030	"	"	"	1081.50	U/15—1.05	450	"	"	"	43/65—	.40—	180.00

TOTAL 252817 Lbs.

Sales for the week ending August 7th, 1953 are:

320	lbs.	Reno	U/15	@ 1.14		680	lbs.	Sunny	@ 1.12	U/15
270	"	"	16/20	.96		200	"	Nore 1st	1.11	U/15
490	"	"	21/25	.92		1000	"	" "	.77	21/25
30	"	"	26/30	.80		300	"	" "	.78	21/25
4020	"	"	Peeled	.62		200	"	" "	.85	21/25
60	"	"	"	.65		100	"	" "	.86	21/25
1000	"	Sunny	U/10	1.14						

CREDITS: 1700 lbs. Nore 1st 21/25 @ 88¢
1800 lbs. Nore 1st 26/30 @ 84¢

TOTAL SALES 5,170 Lbs.

137 The shrimp that we have sold is way above the market prices.

I am still waiting for an authorization to sell small shrimp as the market is getting weaker every minute.

Yours very truly,
Penguin Frozen Foods,
Henry Appelbaum.

c.c. Sr. Fraustro

188 PLAINTIFF'S EXHIBIT NO. 25.

(Filed Mar. 12, 1956. Roy H. Johnson, Clerk.)

Penguin Frozen Foods
DEarborn 2-6683—2-6684
120 South LaSalle Street Chicago 3, Illinois

June 12, 1953

Sr. Pedro Pinson
Refrigeradora del Noroeste S A
Mazatlan Sin Mexico

Dear Pedro:

Our inventory thru car No. 31 PFE 5409 is as follows:

100	lbs.	Reno	U/10		1,940	lbs.	Nore	1st	U/15
200	"	"	U/15		5,050	"	"	"	16/20
4,750	"	"	16/20		19,150	"	"	"	21/25
2,200	"	"	21/25		16,695	"	"	"	26/30
895	"	"	26/30		34,990	"	"	"	31/42
3,500	"	"	31/42		15,050	"	"	"	43/65
558	"	"	0/66	12 oz.	400	"	"	2nd	U/15
1,000	"	Sunny	U/10		3,640	"	"	"	16/20
1,050	"	"	U/15		4,900	"	"	"	21/25
1,850	"	"	16/20		2,800	"	"	"	26/30
650	"	"	21/25		3,650	"	"	"	31/42
100	"	"	26/30		50	"	"	"	43/65
250	"	"	31/42		7,500	"	Reno		Peeled

TOTAL 132,918

Sales for the week ending June 12, 1953 are
200 lbs. Reno U/15 @ 1.18

We are holding off on sales as per your request.

I have asked you several times to check into your weights on Peeled Shrimp, not only are they running very sm. l—which you cannot help, but they run from 2 to 4 ounces short on a box. We have been getting a very good price for them and, we might get into a lot of trouble if our weights are not correct.

Please follow thru on this. However, we are going to have to lower our price on our small Peeled Shrimp. Please give me your ideas.

Yours very truly,
Penguin Frozen Foods,
Henry Appelbaum.

cc—Fraustro

189 PLAINTIFF'S EXHIBIT NO. 28.

(Filed Mar. 12, 1956. Roy H. Johnson, Clerk.)

Penguin Frozen Foods
DEarborn 2-6683—2-6684
120 South LaSalle Street Chicago 3, Illinois

May 25, 1953

Refrigeradora del Noroeste SA
Mazatlan Sin Mexico

Att. Sr. Sergio Infante

Gentlemen:

In reply to yo r letter of May 23, 1953.

First, on the storage charges, I thought we had completely agreed with Mr. Infante as to how these would be handled, but obviously some doubt still exists. Insofar as storage bills are received at least two weeks after you desire the monthly report, we were to charge you ½¢ for incoming merchandise and ¼¢ for stored merchandise, and Mr. Infante agreed to this. As to the 10% of the deliveries that are free of storage charges, these 10% are not free of handling charges and the additional leaway, small as it is, was for unusual charges such as returned merchandise. It was completely understood that at the end of the year an adjustment would be made between charges made to Reno and actual storage charges. As to products sold in transit, we also explained to Mr. Infante that except for one car early in the season, the assortment of size and quality (brand) of the shrimp in each car has made this impossible.

Now as to freight charges. As stated on our report. invoices 1160, 1166 and 1168, less invoice C-1168, total 31,826 pounds. Please check this again. As to the charge on March 30, you were only charged for 18,894 pounds, which you can check by multiplying the number of pounds by the rate. If you had taken this trouble before writing, you would have seen that the charge was correct even though the number of pounds was misprinted.

As also explained to Mr. Infante, the $275.00 per month was an estimate of trucking insurance and we were in the process of attempting to have this additional premium

adjusted. The insurance company finally agreed to this last week and as soon as they perform an audit, an adjustment will be made to you accordingly.

Referring back to storage charges, the charge for this month will be 72¢ for incoming merchandise and 30¢ for stored merchandise. I wrote the complete details on this several weeks ago.

Hoping this answers your questions, and finds you in good health, I remain

Yours very truly
Penguin Frozen Foods.

190 PLAINTIFF'S EXHIBIT NO. 29.

(Filed Mar. 12, 1956. Roy H. Johnson, Clerk.)

Penguin Frozen Foods
120 South LaSalle Street
Chicago 3, Illinois

Jan. 20, 1953

Sr. Pedro Pinson
c/o Refrigeradora del Noroeste S. A.
Mazatlan, Sinaloa, Mexico

Dear Pedro:

On this date I sent a check to the Nacional Financiera for $2,149.38 covering the December, 1952 report. I'm sorry I deducted the breading before, but as you can see, Dad has straightened me out.

On the freight charge for December, we accrued approximately $1700 on November 31st for unpaid freight bills and then charged you in error for them in December when they were paid. We now show a credit for you for this amount and we will reflect same on this months report.

I'm looking forward to getting down to Mazaflan and to learning the shrimp business first hand from you. All I have to do is talk dad into it.

Best regards.

Sincerely,
Penguin Frozen Foods
/s/ Bob
Robert D. Appelbaum

P. S. We have paid thru car #13 to the bank.

DEFENDANT'S EXHIBITS RECEIVED IN EVIDENCE.

191 DEFENDANT'S EXHIBIT NO. 1.

(Filed Mar. 12, 1956. Roy H. Johnson, Clerk.)

Penguin Frozen Foods

Report to Refrigeradora del Noroeste S. A.

March 31, 1953

Gross amount due Reno		$21,822.95
Less commission March sales 5% of $124,042.85		6,202.14
		15,620.81
Expenses chargeable to Reno		
Storage (March)	$ 698.68	
Storage (per audit to February 28, 1953)	1,442.98*	
Freight	1,305.73	
Customs	52.35	
Transit and truck insurance	789.48	
Storage and products insurance	35.12	
Cash advances	650.00	2,088.38
Net amount due Reno		$13,532.43

*Denotes red figure.

REPORT TO REFRIGERADORA DEL NOROESTE, S. A.

March 31, 1953

Car	Car number	Your billing	1952-1953 production: March sales (pounds)	March sales (dollars)	Previous sales	Total sales to March 31	Inventory—March 31 (pounds)	Inventory value—92% of invoice	Advanced to March 31, 1953	Additional advance as of March 31, 1953	Total advances as of March 31, 1953
#19	PFE 8462	$ 34,188.04	15,400	$ 14,370.80	$22,449.40	$ 36,820.20	—	$ —	$ 34,561.20	$ 2,259.00	$ 36,820.20
#20	PFE 4690	34,732.34	43,167	36,924.97	—	36,924.97	845	676.34	31,953.75	5,647.56	37,601.31
#21	PFE 2092	32,785.80	44,000	37,046.94	—	37,046.94	—	—	30,162.94	6,884.00	37,046.94
#22	PFE 5956	35,377.60	39,024	35,700.14	—	35,700.14	5,000	3,879.64	32,547.39	7,032.39	39,579.78
		$137,083.78	141,591	$124,042.85	$22,449.40	$146,492.25	5,845	$4,555.98	$129,225.28	$21,822.95	$151,048.23

193

Penguin Frozen Foods

REPORT TO REFRIGERADORA DEL NOROESTE, S. A.

BREAKDOWN OF "RENO" TRANSPORTATION CHARGES—

MARCH 1953

Date shipped	Via carrier	Our check number	Reno pounds shipped	Rate	Amount	Stopover + tax charged	Total Reno charges	Car No. for icing charge	Destination	Our invoice number
February 26, 1953	Rex & Rex	1785	9,029	$1.25	$ 112.75	$ 3.38	$ 116.13	—	Philadelphia, Pa.	1133–1141
March 9, 1953	W. G. McCormick	1795	28,402	1.25	355.03	20.96	375.99	—	New York and Philadelphia	1152–1154
March 12, 1953	Illinois Central	1802	—	—	12.75	.38	13.13	PFE 4690	Chicago ice and salt	—
March 17, 1953	W. G. McCormick	1813	31,826	1.25	397.83	21.92	419.75	—	Washington and New York	1160–1166–1168
March 20, 1953	W. G. McCormick	1813	7,500	Special	100.00	3.00	103.00	—	Baltimore, Maryland	1176
March 20, 1953	Illinois Central	1818	—	—	9.83	.29	10.12	PFE 2092	Chicago, Illinois	—
March 20, 1953	Illinois Central	1818	—	—	15.09	.45	15.54	PFE 5956	Chicago, Illinois	—
March 30, 1953	W. G. McCormick	1846	23,618	1.25	236.18	17.39	253.57	—	Washington and New York	1185–1190
			100,366		$1,239.46	$67.77	1,307.23			
	Miscellaneous credit						1.50*			
	TOTAL MARCH FREIGHT EXPENSE—RENO						$1,305.73			

* Denotes red figures.

194 Storage charge is figured by taking the total pounds received during the month of March.

132,036 lbs. (cars 20 thru 22) at ½ cent plus inventory as of Feb. 28, 1953, 15400 pounds at ¼ cent.

132,036 × .005 + 15,400 × .0025 = $698.68.

Credit of $1,442.98 is based on over estimations and storage audit to 2/28/53.

Freight charges are broken down on the attached schedule.

Customs charges are for 3 cars at $17.45 per car or $52.35.

Transit and truck insurance are computed by multiplying Reno invoice price on cars received by 50 cents per $100.00—adding $275.00 for truck insurance.

$102,895.74 × .005 + $275.00 = $789.48.

Have not yet heard from the insurance company on the new rates. I am pressing them however, and expect to secure both a reduction and sizable refund.

Storage and products insurance are calculated as follows

Storage Insurance = 100% of inventory value on March 31, 1952 at .2165 per $100.00 per year. Inventory value = .92 × 4,555.98 = $4952.00.

$49.52 × .2165 = $10.72 divided by 12 =	.89
Products Liability = .276 per $1,000.00 sales	
= .276 × 124,042 =	34.23
Total	35.12

Cash advances were to Sergio Infante

Our check No. 1797	$200.00
" " 1812	300.00
Cash	150.00
Total	650.00

195 DEFENDANT'S EXHIBIT NO. 3.

(Filed Mar. 12, 1956. Roy H. Johnson, Clerk.)

Mex

IB 55 NL PD Oct 21 1953 422P

Refrigeradora del Noroeste SA

Vicente Guerrero 108 Oriente Mazatlan Sin Mex your wire October 20 received not at all surprised as placed no reliance whatever in your promises to ship. Your entire conduct since February 25 1953 proves conclusively that your continuous objective has been to evade the obligations of our contract our counsel advises us that we are now entitled to bring suit against you

Henry Appelbaum Penguin Frozen Foods
Confirmation Copy to be Mailed.

DE 2-6683 Sub Penguin Frozen Foods 120 So LaSalle St room 842

196 DEFENDANT'S EXHIBIT NO. 4.

(Filed Mareh 12, 1956. Roy H. Johnson, Clerk.)

Copy

March 6, 1953.

Sr. Don Oscar Fraustro CPT
Nacional Financiera
V Carranza 25
Mexico D F Mexico

Dear Sir:

In view of the very good relationship we have enjoyed for the past years, I do not understand the recent letters and telegrams I have received regarding the cancellation of our contract with Refrigeradora del Noroeste.

Per the agreement signed July 22nd, 1952, which I am enclosing a copy of, the contract was to run at least until 1954. However, this is not the point. All the members of the Reno Board of Directors should know by this time

that any changes they wish to make in the contract which will benefit Reno and not hurt me can be made at any time, even if we have a contract for ten years.

I have been doing very well for Reno in the past years and I just do not understand why the Board of Directors does not appreciate it.

I wish you would write me and tell me what is the reason for these letters because every time I discuss the contract with the board, we always reach an agreement. I am sure that if there are any differences in the contract the Board of Directors wishes to discuss, we can reach an agreement without threats of cancellation.

Yours very truly,
Penguin Frozen Foods,
Henry Appelbaum.

197 P. S. Just had a meeting with the insurance people and have worked out a deal to combine freight and truck insurance under one policy, thereby saving Reno about $2,000.00 a year.

198 DEFENDANT'S EXHIBIT NO. 5.

(Filed March 12, 1956. Roy H. Johnson, Clerk.)

Oscar Fraustro M.
Contador Publico Y Auditor
Universidad Nacional de Mexico

México, D. F., 11 de Marzo de 1953.

Mr. Henry Appelbaum.
Penguin Frozen Foods.
120 South La Salle Street.
Chicago 3, Illinois.

Estimado señor Appelbaum:

Recibí su atenta de fecha 6 del actual y puedo manifesarle que efectivamente los miembros del Consejo de Administración aprecian en su justo valor los servicios de distribución que usted ha realizado para Reno, así como también el nuevo arreglo de seguros bajo una sola póliza, combinando el transporte por Ferrocarril y "truck" que según me manifiesta representará un ahorro para Reno de Dls. 2.000.00 al año.

Mi interpretación personal sobre las cartas y telegramas avisando la cancelación del Contrato con Reno, no tienen más objeto que dejar en absoluta libertad a los nuevos directivos de Nacional Financiera para la contratacion de la distribución del camarón de Reno y no dar la impresión de que se ha celebrado en forma irrevocable un Contrato a largo plazo.

Mi impresión es que al ser informados ampliamente de los resultados obtenidos por su distribución y precisamente por la de esta última temporada, no tendrán ningún inconveniente en que usted continúe haciéndose cargo de dicha distribución, por lo que creo sería conveniente una visita de usted a esta capital cuando sea el momento de fijar las bases para la distribución de la temporado venidera.

Aprovecho la oportunidad para enviarle un cordial saludo.

Oscar Fraustro, C.P.T.

199 DEFENDANT'S EXHIBIT NO. 5-A.

(Filed March 12, 1956. Roy H. Johnson, Clerk.)

Mexico, D. F., March 11, 1953.

Mr. Henry Appelbaum,
Penguin Frozen Foods,
120 South LaSalle Street,
Chicago 3, Ill.

Dear Mr. Appelbaum:

I received your letter dated the 6th of March, and I can indicate that indeed the members of the board of directors appreciate in their just value the services of distribution that you have made for Reno, and also the new arrangements of insurances on one policy combining the transportation by railroad and truck that you indicate will represent a saving for Reno of $2,000 per year.

My personal interpretation on the letters and telegrams advising of the cancelling of the contract with Reno have no more object than to leave the new directors of Nacional Financiera in absolute liberty for the contracting for the distribution of shrimp by Reno, and not to give the impression it has formed an irrevocable contract for a long period.

My impression is that they will be informed amply on the results obtained by your distribution and precisely those of the last season, they will not have any objection that you continue to handle such distribution.

Thus I believe it would be advisable for you to visit this capital at the moment that it be necessary to determine the basis for the coming season's distribution.

I take this opportunity to send you a cordial salutation.
OF/bme.

Oscar Fraustro, C.P.T.

200 DEFENDANT'S EXHIBIT NO. 6.

(Filed March 12, 1956. Roy H. Johnson, Clerk.)

March 16, 1953.

Sr. Don Oscar Fraustro CPT
Nacional Financiera
V Carranza 25
Mexico City D F Mexico

Dear Oscar:

It was a pleasure to receive your kind letter and I am deeply appreciative of your clarifying the position of the Reno Board of Directors.

Whenever you advise me that it is the opportune time to come to Mexico, I shall be most happy to do so. However, as the National Fisheries Institute convention runs from April 13th to April 15th, I would prefer coming after that date.

I would appreciate it very much if you would make an appointment at an appropriate time for me to meet the Sub-Directors Gral of the Nacional Financiera. Also, any other appointments with people you feel I should meet.

Hoping to hear from you soon as to when I should come to Mexico and with my very best personal wishes, I remain

Yours very truly,
Penguin Frozen Foods
Henry Appelbaum.

201 DEFENDANT'S EXHIBIT NO. 8.

(Filed March 12, 1956. Roy H. Johnson, Clerk.)

Congeladora Del Pacifico, S. A.
Mazatlan, Sin. Mexico

November 23, 1954.

Crest Importing Company, Inc.
San Diego, California.

Gentlemen:

As per the instructions which we received from Exportadores Asociados, S. A. de C. V., enclosed herewith we are sending you (3) copies of the contract between Easa and Crest, that has been written in English. Please sign each one of the copies and return these directly to Exportadores Asociados.

We thank you for your kind attention to this matter, and remain,

Yours very truly,
Congeladora Del Pacifico, S. A.

Encl:
cc: Exportadores Asociados.
mem/

202 Agreement for Sale of Shrimp Between Exportadores Asociados, S. A. de C. V. and Crest Importing Company, Inc.

In the City of México, Federal District, Mexico, on the 5th day of October, 1953, Exportadores Asociados, S. A. de C. V., hereinafter called "Shipper", and Crest Importing Company, Inc., a California corporation, hereinafter called "Crest", entered into the following agreement:

1. Shipper is a Mexican corporation incorporated in accordance with the legal requirements of the Republic of Mexico.

2. Crest is engaged in distributing in the United States of America and elsewhere frozen seafoods and other commodities and has facilities for making such distribution at market prices.

3. Shipper agrees to sell to Crest, and Crest agrees to buy from Shipper on the terms hereinafter stated, Shipper's entire production of frozen shrimp for a period beginning fom the date of execution of this agreement and ending August 31, 1956.

4. Shipper guarantees that all shrimp sold under this agreement shall be of good and merchantable quality and shall conform to the requirements of the Food and Drug laws of the United States and the requirements of the food, drug and health laws of any jurisdiction in which the same may be resold by Crest. Shrimp not so conforming shall not be considered as sold or purchased under this agreement and any moneys advanced by Crest on account of any shipment of shrimp by Shipper purporting to be made under this agreement but which does not so conform shall, immediately on the determination of non-conformity, be due and owing from Shipper to Crest, and Crest may deduct the amount thereof from any moneys due or thereafter to become due from Crest to Shipper.

203 5. As shrimp deliverable under this agreement are ready for shipment, Shipper will forward to Customs Broker at border original shipping documents and all papers necessary for entry of the shipment into de United States. Shipper may then draw on Crest for seventy five (75) percent of the market price as of the date of shipment. Such market price shall be the price last advised by Crest to Shipper. Such drafts shall be accompanied by invoice indicating the number and size of the cartons making up the shipment, the count or grade of the shrimp, copy of the nota de remisión, and copy of bill of lading. Crest agrees to honor such drafts covering shipments immediately upon presentation of such draft through its own bank, with the provision, however, should any shipment not receive clearance from the United States Food and Drug Administration permitting the sale of such shipment that any moneys advanced shall be charged back to the Shipper under the provisions of paragraph (4). Crest agrees to keep Shipper informed of market conditions in the United States with reference to the wholesale price for shrimp.

6. Crest agrees to pay Shipper as the price for the shrimp a sum equal to ..... of the price at which Crest may sell it in the United States, less freight or transportation expenses and refrigeration expenses while in transit. Other expenses such as warehousing, warehouse insurance, sub-brokerage, and selling

expenses shall be for Crest's account that allowances for incorrect count or poor quality or weight shall be for Shipper's account. Custom duties and charges are for account of the Shipper.

Crest shall use its best efforts to obtain the prevailing market price at place of sale of each shipment. Crest also assumes all credit risk on sales.

204 7. Crest and Shipper agree that all merchandise shall be packed under a label to the designated by Crest and which label or trademark shall be owned by Crest. Crest agrees to secure all containers required for shrimp sold under such labels and Shipper agrees that the cost of such containers shall be paid by the Shipper.

8. Crest agrees to place and maintain insurance against all risk of physical loss or damage to shipments of shrimp hereunder, except loss of market due to delay, inherent vice, and loss or damage arising from war. Crest may in its discretion determine and declare the value of each shipment. In case of a recovery for any loss insured against, the amount of such recovery shall, for the purposes of paragraph (6), be deemed to be the gross resale price of the shrimp lost or damaged.

9. This agreement shall bind and inure to the benefit of the successors and assigns of the parties.

10. All payments to be made under or referred to in this agreement shall be in funds of the United States of America.

11. Any controversy hereafter arising out of, under or concerning this agreement, or the refusal of either party to perform the whole or any part hereof, shall be settled by arbitration as provided in Part 3, Title X of the Code of Civil Procedure of the State of California.

12. The parties agree that the foregoing are full, true and complete material provisions coinciding with the discussions conducted on the matter in the City of Mexico, Federal District, Mexico, duly authorized by the Board of Directors of Exportadores Asociados, S. A. de C. V. in accordance with the minutes of the meeting of July

205 10, 1953—authorizing the celebration of such agreement, and that in the event of disagreement as to the meaning, effect, or interpretation of said agreement, the foregoing English text shall control.

Executed in Triplicate.

Exportadores Asociados, S. A. de C. V.
By (Illegible)
Crest Importing Company, Inc.
By J. W. Willis.

206 DEFENDANT'S EXHIBIT NO. 12.

(Filed March 12, 1956. Roy H. Johnson, Clerk.)

September 11, 1953.

Lic. Raul Martinez-Ostos
Nacional Financiera, S. A.
V. Carranza 25
Mexico City, Mexico

cc: Messrs. Oscar Fraustro
Pedro L. Pinson

Gentlemen:

I think it wise to give you a report on the progress made in the organization of Crest Importing Company.

Naturally, all other phases of the organization are secondary to the marketing and merchandising program. For the past week, I have been in Chicago endeavoring to set up outlets for distribution so that when the new season commences we will be fully prepared. To prevent a lengthy trip through the United States, I asked all of the buyers and sub-brokers with whom I intend to work, to meet me in Chicago. Our program is now well established and I anticipate no difficulty in the marketing of our product.

I would like to explain the function of the sub-broker. The sub-broker, in effect, acts as one of our employees selling at our direction and at prices set by ourselves. He is paid a commission of 2½%, invoices the merchandise, and guarantees the credit of all his sales. I have found that it is usually cheaper to work through a sub-broker than to maintain salesmen in each major market. The sub-broker, at the same time he is selling our product, is selling other commodities. Accordingly, he would have a distinct advantage over us should we elect at first to use our own salesmen.

We will have arrangements in some areas where we will sell direct, and not use a broker. However, in those instances, a large distributor must be given a preferential price, usually equal to the normal sub-brokerage. It is obvious that a distributor will not pay $20,000 to $30,000 for a whole car, and pay the same price that the small buyer pays for five to ten cases. With the present high prices, it is very difficult to find anyone who will buy in large quantities, most buyers preferring to buy in small quan-

tities instead of tying up considerable money in an inventory.

I do not believe it possible for anyone to sell properly by 'phone throughout the whole country, and know that the carrying of spot stocks in key areas, with sales at premium prices by the sub-broker is the most efficient method and the most profitable for the producer.

Now, frankly, I am quite concerned and disturbed to find there is a possibility that the contract of Refrigeradora del Noroeste with Penguin might extend for another year.

I know the firm is not too highly regarded in the industry and do not believe they have either the experience or contacts necessary to do a good job. For example, all of the other producers have long since been liquidated for
207 last year's production. They did not end up at the end of the year with a large unsold inventory of small sizes on a declining market, and at a time when small sizes are most abundant. Obviously, the carrying of this inventory has greatly increased your storage costs and interest charges. Of most importance, however, is the fact that all the small sizes should have been sold at prices at least ten cents a pound higher than the present market.

I have made brokerage arrangements with highly reputable firms and know that many of them would refuse to work with that firm.

I believe that Refrigeradora del Noroeste had a bad experience with another Chicago firm or Stamm Schulman. These gentlemen formerly worked for Morris Fisheries. The owner of Penguin also worked for Morris Fisheries prior to organizing Penguin.

I do not know what the contractual relationship is between Reno and Penguin but, if the former contract provided for cancellation, the withholding of funds by Penguin to assure extension of the contract, seems to be very illegal and very close to blackmail. I would not be at all desirous of having this firm receive any merchandise or money belonging to Crest. I feel a keen responsibility to all of you gentlemen as well as the other organizers of Crest, and am sure you can appreciate the apprehension I would have in entrusting funds or merchandise in view of Penguin's attitude on this matter.

I do not believe Penguin would agree to confine their sales to Chicago. I am sure also that their efforts, instead of building Crest to a larger organization, would be directed towards blocking our aims and growth. I fail to see how

Penguin can be anything but a great handicap, an additional expense, and a source of friction, and sincerely hope that the first year we will not be burdened with the problem of working with them in any way. I believe that relations with Penguin should be severed. If there is any assistance I can give you, I will be glad to do so.

Sincerely,

J. W. Willis.

JWW:lr

208 DEFENDANT'S EXHIBIT NO. 13.

(Filed Mar. 12, 1956. Roy H. Johnson, Clerk.)

June 7, 1955

Mr. J. W. Willis
c/o Mr. Louis A. Kohn
Continental Illinois Bank Building
231 South La Salle Street
Chicago 4, Illinois

Dear Jack:

In compliance with your telephone request of today, I enclose herewith a schedule of frozen shrimp received by Crest Importing Company, Inc. from Exportadores Asociados, S. A. de C. V. and originating from Refrigeradora del Noroeste, S.A. during the period from June 1953 through August 1954.

Concerning the sales, you will note that we have broken this down by pounds on a monthly basis for each car. I trust this will be satisfactory, since to do it in any other manner, would entail a tremendous amount of work and would take, perhaps, several weeks since our records as kept do not readily provide this information.

Kindest personal regards.

Very truly yours,

Crest Importing Company, Inc.

Bill

W. J. Hecht

WJH/fvd

209

SCHEDULE SHOWING ALL SHIPMENTS OF FROZEN SHRIMP RECEIVED BY CREST IMPORTING COMPANY, INC. FROM EXPORTADORES ASOCIADOS, S. A. DE C. V. AND ORIGINATING FROM REFRIGERADORA DEL NOROESTE, S. A. DURING THE PERIOD BEGINNING JUNE 1953 THROUGH AUGUST 1954.

			Date	Pounds and Months Sold														
PFE No.	Cases	Pounds	Crossed	Nov. '53	Dec.	Jan. '54	Feb.	March	April	May	June	July	August	Sept.	Oct.	Nov.	Dec.	January
7912	880	44,000	19/23/53	44,000														
4770	880	44,000	10/23	44,000														
2673	880	44,000	10/30	44,000														
8943	880	44,000	11/3	41,860	2,140													
3261	880	44,000	11/6	8,850	35,150													
47278	880	44,000	11/10	6,750	33,500	3,750												
68474	880	44,000	11/13	25,390	7,067	11,545												
6030	880	44,000	11/18	3,850	5,000	23,250		11,900										
68228	880	44,000	11/23		7,550	17,500	3,800	15,150										
3503	880	44,000	11/23		9,200	16,950	5,050	11,525	1,275									
6642	880	44,000	11/27		7,350	18,000	5,800	2,500	10,350									
6646	880	44,000	12/2		7,650	11,150	4,050	14,100		7,050								
Truck	179.6	8,980	12/4		920	285				7,775								
68208	880	44,000	12/9		1,500	18,350	550			19,225	4,375							
65994	880	44,000	12/14			13,950	1,600	7,200		1,200	15,450	4,600						
67589	880	44,000	12/19			1,500	4,455	13,045	4,650	1,850	13,100	905	4,495					
68358	880	44,000	12/31			7,350	3,400	5,000	5,950	6,650	85	13,515	2,050					
6173	880	44,000	1/7				1,360	6,790	3,100	8,350		20,500	3,900					
6967	880	44,000	1/22				4,150	9,350	2,750	5,950		12,025	8,675	1,100				
2331	880	44,000	1/30				1,005	5,150	4,050	5,390	10,850	6,945	5,700	4,900				
7344	880	44,000	2/8				5,600	13,150			10,350	3,900	7,100	3,900				
47807	880	44,000	2/16				10,500	25,950			2,250	1,050	3,050	600		600		
66553	880	44,000	2/23					44,000										
4497	880	44,000	2/23				7,800	23,250				4,750	5,500	1,550	1,150			
66440	880	44,000	3/8					9,840	8,660	3,950	6,450	5,150	4,300	4,400	1,250			
5961	880	44,000	3/18					8,950	500	2,150	14,150	11,250	2,650	2,850	1,500			
7660	880	44,000	3/26						3,500	750	1,975	26,075	5,950	4,300	1,050	400		
9500	880	44,000	4/17							2,750	6,900	16,250	7,640	5,110	4,750	600		
4484	880	44,000	4/22							1,600	8,550	17,900	3,550	7,900	3,000	1,500		
7890	880	44,000	5/3							510	2,190	11,900	3,725	6,330	13,145	6,200		
3931	880	44,000	5/11								200	7,810	7,090	6,365	13,585	8,950		
67178	880	44,000	5/21								1,450	8,655	7,375	4,370	10,950	8,800	2,400	
6120	880	44,000	5/28									19,000	10,950	5,600	2,100	4,550	1,800	
3861	880	44,000	6/7								2,150	1,800	9,500	5,080	21,370	4,100		
66712	880	44,000	6/18									6,650	8,900	3,450	14,800	9,200	1,000	
47259	880	44,000	7/2										10,900	1,050	12,510	15,805	3,735	
68470	516	25,800	7/12										5,700	50	9,650	2,910	5,430	2,060
Total	31,495.6	1,574,780		218,700	117,025	143,580	59,120	226,850	44,795	75,150	100,475	200,630	128,700	68,905	110,810	63,615	14,365	2,060

I certify to the best of my knowledge and belief this is a true and complete statement.

John W. Willis,
June 8, 1953.

210 DEFENDANT'S EXHIBIT NO. 19.

(Filed Mar. 12, 1956. Roy H. Johnson, Clerk.)

Law Offices of
J. A. Donnelley and Richard P. MacNulty
Suite 1403 Bank of America Building
San Diego 1, California
Franklin 9-5196

September 17, 1953

Sr. Oscar Fraustro, C.P.T.
Contralor General
Nacional Financiera, S.A.
V. Carranza 25
Mexico, D. F.

Dear Senor Fraustro:

Pursuant to the understanding made in my office when you were in San Diego, I am enclosing stock certificate Number 1 of Crest Importing Company, Inc. in the amount of six hundred fifty (650) shares of the par value of $100.00 issued to Exportadores Asociados, S.A. de C.V.

With best personal wishes,

Sincerely yours,

J. A. Donnelley

Enc. 1

cc: Mr. J. W. Willis
Exportadores Asociados, S.A. de C.V.

JAD:GM

211 DEFENDANT'S EXHIBIT NO. 34.

(Filed Mar. 12, 1956. Roy H. Johnson, Clerk.)

Western Union Telegram

DA 392 1953 Mar 5 PM 1 38

D.SAA663 16-SA Mexico City Mex 5 1211 P
Henry Appelbaum, Penguin Frozen Foods—
120 South La Salle St Chgo—

Contestando suyo 26 Febrero insistimos nuestro aviso cancelacion contracto si desea discutir punto sugerimosle Trasladarse Esta—

Refrigeradora Del Noroeste SA

(Translation: Replying yours February 26 insist our notice cancellation contract if wish discuss point suggest you come Mexico City.)

212 DEFENDANT'S EXHIBIT NO. 35.

(Filed Mar. 12, 1956. Roy H. Johnson, Clerk.)

Refrigeradora Del Noroeste, S.A.
Mazatlan, Sinaloa, Mexico

July 27, 1953.

Mr. Henry Appelbaum,
Penguin Frozen Foods,
120 South LaSalle St.
Chicago, Ill.
U. S. A.

Dear Henry:

This will acknowledge receipt of your favour of July 22nd, which you wrote us in reply to our letter of July 17th.

Your letter was duely presented to our Board of Directors and after having taken due note of its contents, it is the desire of the members of said Board, that now that you

are back in your offices, we will appreciate more detailed comments as to what are your ideas and suggestions for the sale of Inventory now in Chicago. We mean both on the small and large shrimp.

In general terms, our Board's opinion seems to be that sales should be made as quickly as possible, provided, naturally, that the prices are satisfactory.

Thus, we shall await your letter, at the earliest possible moment.

In the meanwhile, we remain,

Cordially yours,

/s/ Pedro L. Pinson
President

c.c.p. Lic. Raul Martinez Ostos, Nacional Financiera, S. A.
c.c.p. Sr. Don Oscar Fraustro, C.P.T., Nacional Financiera, S. A.

PLP/yg

213 DEFENDANT'S EXHIBIT NO. 36.

(Filed Mar. 12, 1956. Roy H. Johnson, Clerk.)

August 4, 1953

Sr. Pedro Pinson
Refrigeradora del Noroeste SA
Mazatlan Sin Mexico

Dear Pedro:

Received your letter dated July 27th and wish to inform you that my letter of the 22nd was not in answer to your letter of the 17th. In fact, I have not answered your letter of the 17th as we are preparing figures to show you where Mr. Infante has omitted several important factors. I think you know after my conversation with you that the expenses as charged to you are correct. Our detailed reply to this and to Mr. Infante's letter dated July 20th will follow shortly. This letter was received in our office on August 3rd for which reason you have not received a reply earlier.

My letter of the 22nd was in answer to your telephone request of the 21st, that I give the board my opinion as far as the inventory is concerned.

Now in answer to your letter dated August 1st, I wish to inform you that we have quotations from Carmen as follows:

21/25	26/30	31/35	31/42	43/50	51/65
67¢	62¢	57¢	47¢	39¢	34¢.

Delivered Chicago

These prices are for whites and we were quoted Browns at 2¢ less.

I thought that when we got a load of large shrimp in, we might be able to discount these a little and sell the small ones at a better price.

However, the last car is at least ten days away and from the looks of the market today, we should try to get as much as we can for the large shrimp now. Unless we want to sacrifice the small shrimp, it will not help us very much to move them, because at this time large quantities of small shrimp are just not being bought, except at ridiculously low prices. I look for this market to get better on these sizes and see no reason why we should sell the small shrimp at the low prices that are being offered at the present time. I don't believe they can go any lower. We should wait for a spot in the market, when inventories will be cleaned up, and we can realize more money than is possible at present.

However, if you think you want to move your inventory of 31/42s, I believe we can unload them at between 48 and 50¢. The sizes smaller are absolutely at a stand still and the licking would be too great for you to 214 take. You have nothing to lose, at least not very much, if you hang on for a few weeks.

Never, in the shrimp market has there been such a large spread between the large and small sizes as there is today. Brownsville is quoting at least 16¢ a pound less on the 15/20s than we are getting in order to move some of the smaller sizes at cheap prices.

There is no production of U/10s, U/15s and 16/20s to speak of. That is why we are able to get such high prices also one of the reasons we have been selling as fast as we can.

I think one of these days the small ones are going to be less plentiful and the market will reverse itself to where 15/20s will be lower and smaller shrimp will come up and lessen the spread.

If you will recall, at least five or six weeks ago, I asked you for a letter authorizing me to sell the small shrimp and for you to give me the minimum prices at which we might sell. At that time we could have unloaded them at a reasonable figure. At this writing, I have not received any instructions or authorization in writing from you and I do not want to take it upon myself to sell under the market, which I wanted to do at that time. This was the only way the small shrimp could have been moved.

Awaiting your pleasure, I remain,

Yours very truly

Penguin Frozen Foods
Henry Appelbaum

c.c. Lic Ostos
c.c. Sr. Fraustro

215 DEFENDANT'S EXHIBIT NO. 37.

(Filed Mar. 12, 1956. Roy H. Johnson, Clerk.)

Refrigeradora del Noroeste, S. A.
Mazatlan, Sin., Mexico

Telegrama.

Fecha: Agosto 13 de 1953.

Penguin Frozen Foods,
120 South LaSalle St.,
Chicago, Illinois.

Confirm todays phone conversation as to firm bid received through Willis for all present inventory thirty one fourty twos at fourty eight cents delivered Detroit. Stop Please contact Willis immediately and unless you can get better price or equal for same poundage effect sale through him Stop Minimum price acceptable for fourty three sixty fives fourty two cents Chicago provided sale involves total present inventory that size and is made between now and Monday Stop Recall you Willis offer good until tomorrow thus make sure if you do not take it you can equal or better his price between now and next Monday on a sale involving total inventory that size.

Pedro L. Pinson.

216 DEFENDANT'S EXHIBIT NO. 38.

(Filed Mar. 12, 1956. Roy H. Johnson, Clerk.)

(58)

Western Union

DA520 1953 Aug 27 PM 4 08

D.SAA830 107—SA Mexico City Mex 27 212PM—

Sr Henry Appelbaum Penguin Frozen Foods—
120 South LaSalle St Chgo—

Have advised Bank America accept immediate payment all shrimp already sold at ninety two per cent of selling prices as shown your weekly sales reports of which last one received is dated August twenty first Stop On balance inventory shall continue accept this payment procedure as weekly sales reports are received and provided prices shown are acceptable to us Stop This to be in vigor up to September Eleventh and in lieu of our making immediate use of clause thirteen which shall apply on unsold inventory after above specified date Stop If wish discuss other matters your mind shall gladly meet with you Mexico City your convenience—

Refrigeradora del Noroeste S A —

217 DEFENDANT'S EXHIBIT NO. 45.

(Filed Mar. 12, 1956. Roy H. Johnson, Clerk.)

(Letterhead of Refrigeradora del Noroeste, S.A., Mazatlán, Sinaloa, Méx.)

Mayo 4, 1953.

Mr. Henry Appelbaum,
Penguin Frozen Foods,
120 South La Salle St.,
Chicago, Ill.

Dear Henry:

Thank you for your favour of May 1rst.

We now have cars 27 and 28 ready—they will go wednesday or thursday—and 29 (of which we have half), should be ready by friday. As you can see, we are doing somewhat better, but it is nothing fantastic, and, furthermore, Mazatlan is the only place where there is some shrimp. Consequently, I cannot see how the market could be affected by the present production here.

As to the HTH Tablet Hypochlorinator, please buy one for us, together with whatever number of drums (tablets) that Larry Strasburger will recommend for a trial period of say three months. Complete instructions as to the installation and operation must be sent to us.

By the way, did you ever sent the box of shrimp, I offered Mrs. Strasburger?

Regarding peeled short weights, I just cannot understand it,—because you know how carefully we handle our products. I have, nevertheless, renewed instructions to the plant about it.

Booth and other buyers here, have raised their purchase price to Dlrs. 1.10 (!) for U/10, U/15, and 16/20 (!!!)—How are you doing? It is of the utmost importance that we be informed of all raises in price without delay.

West best regards, I remain,

sincerely yours,

Pedro L. Pinson.

PLP—jl.

218 DEFENDANT'S EXHIBIT NO. 46.

(Filed Mar. 12, 1956. Roy H. Johnson, Clerk.)

Penguin Frozen Foods

REPORT TO REFRIGERADORA DEL NOROESTE, S. A.

October 31, 1953

Gross amount due Reno		$ 2,520.09
Commission on October sales (5% of $16,362.65)		818.13
		1,701.96
Less Reno expenses		
Storage	$ 288.75	
Freight	203.12	
Storage and products insurance	10.75	502.62
Due Reno for October 1953		1,199.34
Breading (at cost)	3,205.62	
Breading freight and customs	663.16	
Deveining machine	149.00	
Due Penguin as of October 1, 1953	11,384.44	15,402.22
Due Penguin as of October 31, 1953		$14,202.88

Add Hamilton Supplies

275.25
447.49
71.29
4.75

798.78

Penguin Frozen Foods

REPORT TO REFRIGERADORA DEL NOROESTE, S. A.

October 31, 1953

Car	Car No.	Your billing	October sales (pounds)	October sales (dollars)	Previous sales	Total sales	October 31, 1953 inventory (pounds)	October 31, 1953 inventory 92% value	Advances to October 31, 1953	Additional advances as of October 31, 1953	Total Total to October 31, 1953
29	PFE9850	$ 39,501.30	850	$ 605.50	$ 36,937.62	$ 37,543.12	—	$ —	$ 37,485.02	$ 58.10	$ 37,543.12
30	PFE5365	44,857.00	40	16.00	41,024.40	41,040.40	—	—	41,040.96	.56*	41,040.40
31	PFE7428	28,586.00	5,950	2,455.00	23,154.30	25,609.30	4,150	2,290.80	27,430.00	470.10	27,900.10
32	PFE5409	27,317.00	9,400	3,830.50	16,335.60	20,166.10	9,460	5,331.62	24,754.52	743.20	25,497.72
33	PFE8957	25,467.50	10	5.45	13,861.65	13,867.10	18,585	7,478.22	21,344.24	1.08	21,345.32
34	PFE66524	26,477.00	3,655	2,288.70	16,107.00	18,395.70	12,765	5,646.50	23,793.14	249.06	24,042.20
35	PFE47048	25,292.50	5,550	3,674.00	14,814.75	18,488.75	9,495	4,364.48	22,459.03	394.20	22,853.23
36	PFE48576	31,301.20	1,400	931.00	25,767.44	26,698.44	6,250	2,647.30	29,215.14	130.60	29,345.74
37	PFE68262	36,649.62	4,002	2,884.50	33,054.50	35,939.00	2,452	1,341.82	36,799.73	481.09	37,280.82
38	PFE7754	30,734.72	293*	328.00*	27,940.43	27,612.43	4,531	2,733.69	30,352.90	6.78*	30,346.12
		$316,183.84	30,564	$16,362.65	$248,997.69	$265,360.34	65,688	$31,834.43	$294,674.68	$ 2,520.09	$297,194.77

1. Only covers cars not previously reported sold out.
2. Peeled shrimp are running very small and short weight. We are having them laboratory tested.

* Denotes red figure.

Defendant's Exhibit No. 46.

563

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Penguin Frozen Foods

REPORT TO REFRIGERADORA DEL NOROESTE, S. A.

October 31, 1953

Date	Carrier	Our check No.	Reno pounds shipped	Rate	Amount	Stopover and tax charge	Total Reno charge	Car No. for icing charge	Destination	Our invoice No.
October 12, 1953	Rex & Rex	#2261	15,000	$1.25	$187.50	$15.62	$203.12		New York	#1500

220½

Penguin Frozen Foods

EXPLANATION OF CHARGES FOR MONTH OF OCTOBER 1953

TO

REFRIGERADORA DEL NOROESTE, S. A.

STORAGE CHARGES—Based on 96,252 pounds at 30 cents per cwt.

FREIGHT CHARGES—See attached schedule.

STORAGE INSURANCE—Based on Inventory of $34,602.60 at .2165 per year $6.24.

PRODUCTS INSURANCE—.276 per $1000 sales $4.51.

All other charges are at cost for items delivered to Refrigeradora del Noroeste SA.

221 DEFENDANT'S EXHIBIT NO. 47.

(Filed Mar. 12, 1956. Roy H. Johnson, Clerk.)

Penguin Frozen Foods

REPORT TO REFRIGERADORA DEL NOROESTE, S. A.

November 30, 1953

Gross amount due Reno		$ 1,639.64
Less commission on November sales		
5% of $12,976.50		648.82
		990.82
Less Reno expenses		
Storage	$ 197.06	
Freight	228.35	
Storage and products insurance	7.60	
Bank charges	10.00	443.01
Net amount due Reno for November		547.81
Less:		
Hamilton Co. cartons and labels	798.78	
Due Penguin as of October 31, 1953	14,202.88	15,001.66
Net Amount Due Penguin		$14,453.85

Penguin Frozen Foods

REPORT TO REFRIGERADORA DEL NOROESTE, S. A.
ANALYSIS OF FREIGHT CHARGES
November 30, 1953

Date	Carrier	Our check No.	Reno pounds shipped	Rate	Amount	Stopover and tax charge	Total Reno charge	Car No. for icing charge	Destination	Our invoice No.
November 9, 1953	Rex & Rex	2,332	16,790	$1.25	$209.88	$6.30	$216.18		New York	1517 &
November 30, 1953	Ill. Central	2,373					12.17	ARL24355		C1517
							$228.35			

REPORT TO REFRIGERADORA DEL NOROESTE, S. A.
FROM PENGUIN FROZEN FOODS
November 30, 1953

EXPLANATION OF CHARGES TO RENO

Storage Charges—Based on 65,688 pounds at 30¢ per cwt.

Freight Charges—See attached schedule.

Storage Insurance—Based on inventory of $22,280.00 at .2165 per year—$4.02.

Products Insurance—.276 per $1000 sales—$3.58.

Bank Charges—$5.00 each for charge on expired letters of credit never used.

Hamilton Cartons and label expense—Actual cost to Penguin of Hamilton labels and cartons shipped to Reno and never returned.

Defendant's Exhibit No. 47.

224 DEFENDANT'S EXHIBIT NO. 48.

(Filed Mar. 12, 1956. Roy H. Johnson, Clerk.)

Penguin Frozen Foods

REPORT TO REFRIGERADORA DEL NOROESTE, S. A.

December 31, 1953

Gross amount due Reno		$ 1,737.19
Less 5% commission on December sales (5% of $11,434.05)		571.70
		1,165.49
Less Reno expense		
Storage	$118.28	
Freight	16.61	
Storage and products insurance	5.28	
Sales allowance	130.00	270.17
Net due Reno for December 1953		895.32
Due Penguin as of December 1, 1953		14,453.85
Net Amount Due Penguin		$13,558.53

Penguin Frozen Foods

REPORT TO REFRIGERADORA DEL NOROESTE, S. A.*

November 30, 1953

Car	Car No.	Your billing	sales (pounds)	sales (dollars)	Previous sales	Total sales	November 30, 1953 inventory (pounds)	November 30, 1953 inventory 92% value	Advances to November 30, 1953	Additional advances as of November 30, 1953	Total advances to November 30, 1953
31	PFE7428	$ 28,586.00	—	$ —	$ 25,609.30	$ 25,609.30	4,150	$ 2,290.80	$ 27,900.10	$ —	$ 27,900.10
32	PFE5409	27,317.00	1,250	853.50	20,166.10	21,019.60	8,210	4,557.22	25,497.72	79.10	25,576.82
33	PFE8957	25,467.50	13,140	5,466.00	13,867.10	19,333.10	5,445	3,005.34	21,345.32	993.12	22,338.44
34	PFE66524	26,477.00	1,200	803.00	18,395.70	19,198.70	9,565	4,889.80	24,042.20	46.30	24,088.50
35	PFE47048	25,292.50	7,045	3,529.60	18,488.75	22,018.35	2,450	1,306.40	22,853.23	471.52	23,324.75
36	PFE48576	31,301.20	1,650	1,122.00	26,698.44	27,820.44	4,600	1,584.70	29,345.74	59.40	29,405.14
37	PFE68262	36,649.62	950	646.00	35,939.00	36,585.00	1,502	794.60	37,280.82	98.78	37,379.60
38[1]	PFE7754	30,734.72	1,025	556.40	27,612.43	28,168.83	3,506	2,068.71	30,346.42	108.58	30,237.54
		$231,825.54	26,260	$12,976.50	$186,776.82	$199,753.32	39,428	$20,497.57	$218,611.25	$ 1,639.64	$220,250.89

* This report covers cars not previously reported as sold out.

1. Minus figure caused by returns of 200 Sunny U/10 75 Reno U/15 which contained small shrimp and poor quality. (See credit memo C1449.) Peeled shrimp are all short weight.

225

Penguin Frozen Foods

REPORT TO REFRIGERADORA DEL NOROESTE, S. A.*

December 31, 1953

1952-1953 PRODUCTION

Car	Car No.	Your billing	December sales (pounds)	December sales (dollars)	Previous sales	Total sales	December 31, 1953 inventory (pounds)	December 31, 1953 inventory value 92% of invoice	Advances to December 31, 1953	Additional advance as of December 31, 1953	Total advanced as of December 31, 1953
#31	PFE7428	$ 28,586.00	1,400	$ 967.00	$ 25,609.30	$ 26,576.30	2,750	$ 1,518.00	$ 27,900.10	$ 194.20	$ 28,094.30
#32	5409	27,317.00	8,210	5,365.90	21,019.60	26,385.50	—	—	25,576.82	808.68[1]	26,385.50
#33	8957	25,467.50	1,350	729.00	19,333.10	20,062.10	4,095	2,260.44	22,338.44	15.90[2]	22,322.54
#34	66524	26,477.00	1,645	724.80	19,198.70	19,923.50	7,920	4,360.34	24,088.50	195.34	24,283.84
#35	47048	25,292.50	2,250	1,215.00	22,018.35	23,233.35	200	64.40	23,324.75	27.00[3]	23,297.75
#36	48576	31,301.20	4,600	2,073.50	27,820.44	29,893.94	—	—	29,405.14	488.80	29,893.94
#37	68262	36,649.62	1,352	963.30	36,585.00	37,548.30	150	48.30	37,379.60	217.00	37,596.60
#38	7754	30,734.72	910	604.45	28,168.83	27,564.38	4,414	2,549.23	30,237.54	123.93[4]	30,113.61
		$231,825.54	19,897	$11,434.05	$199,753.32	$211,187.37	19,529	$10,800.71	$220,250.89	$ 1,737.19	$221,988.08

* This report covers cars not previously reported as sold out.

1. Our invoice 1529—credit allowance of 10% on 1,710 pounds peeled shrimp account of short weight and poor quality.
2. Our invoice 1529—credit allowance of 10% on 1,350 pounds peeled shrimp account of short weight and poor quality.
3. Our invoice 1529—credit allowance of 10% on 2,250 pounds peeled shrimp account of short weight and poor quality.
4. Minus figure caused by return of 1,050 pounds 26/30 more second because of poor quality.

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EXPLANATION OF CHARGES.

STORAGE—39,428 lbs. at 30¢ per cwt.

FREIGHT—Return of merchandise from Milwaukee, Wisc., Nore No. 2s called extremely poor.

STORAGE INS.—Based on inventory of $11,740 at .2165 per year $2.12.

PRODUCTS INS.—.276 per $1000 sales 0 $3.16.

SALES ALLOW.—Credit of 10% given to State Fish on Peeled shrimp remaining in their inventory. 2,000 lbs. at 6¢ $126.00 + $4.00 for sampling and handling.

Defendant's Exhibit No. 48.

569

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DEFENDANT'S EXHIBIT NO. 49.

(Filed Mar. 12, 1956. Roy H. Johnson, Clerk.)

Penguin Frozen Foods

REPORT TO REFRIGERADORA DEL NOROESTE, S. A.

January 31, 1954

Gross amount due Reno		$ 2,493.33
Less 5% commission on January sales (5% of $3,911.62)		195.58
		2,688.91
Less Reno expense		
Storage	$ 58.59	
Freight—(Invoice 1537-38)	90.49	
Store insurance	.86	
Sales allowance	22.00	
Products insurance	1.08	173.02
Net due Penguin for January 1954		2,861.93
Due Penguin as of January 1, 1954		13,558.53
Net Amount Due Penguin		$16,420.46

REPORT TO REFRIGERADORA DEL NOROESTE, S. A.*

January 31, 1954

1952-1953 PRODUCTION

Car	Car No.	Your billing	January sales (pounds)	January sales (dollars)	Previous sales	Total sales	January 31, 1954 inventory (pounds)	January 31, 1954 inventory value 92% invoice	Advances to January 31, 1954	Additional advances as of January 31, 1954	Total advanced as of January 31, 1954
31	PFE7428	$ 28,586.00	200	$ 134.00	$ 26,576.30	$ 26,710.30	2,550	$ 938.40	$ 28,094.30	$ 445.60	$ 27,648.70
33	PFE8957	25,467.50	—	—	20,062.10	20,062.10	4,095	1,506.96	22,322.54	753.48	21,569.06
34	PFE66524	26,477.00	3,570	1,880.56	19,923.50	21,804.06	4,350	1,593.90	24,283.84	885.88	23,397.96
35	PFE47048	25,292.50	—	—	23,233.35	23,233.35	200	46.00	23,297.75	18.40	23,279.35
37	PFE68262	36,649.62	—	—	37,548.30	37,548.30	150	34.50	37,596.60	13.80	37,582.80
38	PFE7754	30,734.72	3,914	1,897.06	27,564.38	29,461.44	500	276.90	30,113.61	376.17	29,737.44
		$173,207.34	7,684	$ 3,911.62	$154,907.93	$158,819.55	11,845	$ 4,395.76	$165,708.64	$ 2,493.33[1]	$163,215.31

* This report covers cars not previously reported as sold out.

1. All merchandise remaining in inventory short weight and poor quality.

Defendant's Exhibit No. 49.

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Penguin Frozen Foods

REPORT TO REFRIGERADORA DEL NOROESTE, S. A.

January 31, 1954

Gross Amt. Due Reno		2,493.33
Less 5% Commission on Jan. Sales (5% of $3911.62)		195.58
		2,688.91
Less Reno Expense		
Storage	58.59	
Freight (Invoice 1537-38)	90.49	
Storage Ins.	.86	
Sales Allowance	22.00	
Products Ins.	1.08	173.02
Net Due Penguin for Jan. 1954		2,861.93
Due Penguin as of Jan. 1, 1954		13,558.53
Net Amount Due Penguin		16,420.46

230 DEFENDANT'S EXHIBIT NO. 58.

(Filed Mar. 12, 1956. Roy H. Johnson, Clerk.)

Penguin Frozen Foods

REPORT TO REFRIGERADORA DEL NOROESTE, S. A.

February 28, 1954

Gross amount due Reno		$ 2,354.84
Less 5% commission		337.53
		2,017.31
Less expenses		
Storage	$ 35.54	
Storage and products insurance	2.71	38.25
Net due Reno for February 1954		1,979.06
Due Penguin as of February 1, 1954		16,420.46
Net Due Penguin		$14,441.40

16 cases of Sunny U/15 Shrimp are being returned by Baraboo as poor quality. We hope to sell same with no loss in sales price.

232 DEFENDANT'S EXHIBIT NO. 72.

(Filed Mar. 12, 1956. Roy H. Johnson, Clerk.)

IN THE UNITED STATES DISTRICT COURT.

* * (Caption—53-C-2482) * *

INTERROGATORIES PROPOUNDED BY DEFENDANT TO PLAINTIFF UNDER RULE 33 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

1. How many pounds of shrimp of all kinds and qualities classified according to size, grade and other classification, were caught or purchased and packed and frozen by Refrigeradora del Noroeste during the period since Car PFE 7754 was shipped to Penguin Frozen Foods on or about July 30, 1953, up to and including August 15, 1954?

2. How many pounds, if any, of the shrimp described in interrogatory 1, classified according to size, grade and other classification, were processed by Refrigeradora del Noroeste but not owned by Refrigeradora del Noroeste?

3. How many pounds, if any, of the shrimp described in interrogatory 1, classified according to size, grade and other classification, were sold by Refrigeradora del Noroeste for consumption in the Republic of Mexico?

4. How many pounds of the shrimp described in interrogatory 1 less the pounds of shrimp, if any, described in interrogatories 2 and 3, classified according to size, grade and other classification, have been sold; how many pounds,

233 classified according to size, grade and other classification, have been consigned; how many pounds, classified according to size, grade and other classification, have been delivered upon trust receipt; and how many pounds, classified according to size, grade and other classification, have been disposed of in any other method, describing such method?

5. What are the names and addresses of all of the persons to whom the shrimp described in interrogatory 1 has been sold or disposed of by consignment, delivery upon trust receipt or other method, and how many pounds, classified according to size, grade and other classification, have been disposed of to each such person and by what method?

6. How many pounds of the shrimp described in interrogatory 4, classified according to size, grade and other classification, have been resold or otherwise disposed of by the persons named in the answer to interrogatory 5 and at what price or prices?

7. How many pounds of the shrimp described in interrogatory 4, classified according to size, grade and other classification, remain unsold or undisposed of by the persons named in the answer to interrogatory 5, what sale or resale price or prices were billed or invoiced by Refrigeradora Noroeste in regard to all such pounds and what is the current market price for each such size, grade and classification?

8. Did Pedro Pinson and Oscar Fraustro, directors of Refrigeradora Noroeste, or either of them, receive a copy of the letter attached to these interrogatories as Exhibit "A" and, if so, when?

9. What is the exact legal relationship between Refrigeradora Noroeste and Nacional Financiera?

10. Who were the directors of Refrigeradora Noroeste on October 19, 1950, and who are the directors at the present, showing the dates and names of all intervening changes?

234 Henry Appelbaum, doing business as
Penguin Frozen Foods,
By Stanford Clinton,
134 N. La Salle St.,
DE 2-0525,
By Robert A. Sprecher,
100 W. Monroe St.,
RA 6-2632.

Of Counsel:
Pritzker, Pritzker & Clinton,
Crowley, Sprecher and Weeks.

235 Exhibit A.

I think it would be wise to give you a report on the progress made by the organization of Crest Importing Co.

Naturally all other phases of the organization are secondary to the marketing and merchandising program. For the past week I have been in Chicago endeavoring to set up outlets for distribution so that when the new season commences we will be fully prepared. To prevent a lengthy

Penguin Frozen Foods

REPORT TO REFRIGERADORA DEL NOROESTE, S. A.*

February 28, 1954

Car	Car No.	Your billing	February sales (pounds)	February sales (dollars)	Previous sales	Total sales	February 28, 1954 inventory (pounds)	February 28, 1954 inventory value 92% invoice	Advances to February 28, 1954	Additional advances as of February 28, 1954	Total advanced as of February 28, 1954
31	PEF7428	$ 28,586.00	2,550	$ 1,479.00	$ 26,710.30	$ 28,189.30	—	—	$ 27,648.70	$ 540.60	$ 28,189.30
33	PFE8957	25,467.50	4,095	2,375.10	20,062.10	22,437.20	—	—	21,569.06	868.14	22,437.20
34	PFE66524	26,477.00	4,350	2,511.50	21,804.06	24,315.56	—	—	23,397.96	917.60	24,315.56
35	PFE47048	25,292.50	200	70.00	23,233.35	23,303.35	—	—	23,279.35	24.00	23,303.35
37	PFE68262	36,649.62	150	52.50	37,548.30	37,600.80	—	—	37,582.80	18.00	37,600.80
38	PFE7754	30,734.72	500	262.50	29,461.44	29,723.94	—	—	29,737.44	13.50	29,723.94
		$173,207.34	11,845	$ 6,750.60	$158,819.55	$165,570.15	—	—	$163,215.31	$ 2,354.84	$165,570.15

* This report covers only those cars not previously reported as sold out.

Defendant's Exhibit No. 58.

trip through the United States, I asked all of the buyers and sub-brokers with whom I intend to work, to meet me in Chicago. Our program is now well established and I anticipate no difficulty in the marketing of our product.

I would like to explain the function of the sub-broker. The sub-broker in effect acts as one of our employees selling at our direction and at prices set by ourselves. He is paid a commission of 2½%. I have found that it is usually cheaper to work through a sub-broker than to maintain salesmen in each major market. The sub-broker at the same time he is selling our product is selling other commodities. Accordingly he would have a distinct advantage over us should we elect at first to use our own salesmen.

We will have arrangements in some areas where we will sell direct, and not use a broker. However, in those instances, a large distributor must be given a preferential price, usually equal to the normal sub-brokerage. It is obvious that a distributor will not pay $20,000 to $30,000 for a whole car, and pay the same price that the small buyer pays for five to ten cases. With the present high prices, it is very difficult to find anyone who will buy in large quantities, most buyers preferring to buy in small quantities instead of tying up considerable money in an inventory.

I do not believe it possible for anyone to sell properly by telephone throughout the whole country and know that the carrying of spot stocks in key areas, with sales at premium prices by the sub-broker is the most efficient method and the most profitable for the producer.

Now, frankly, I am quite concerned and disturbed to find that there is a possibility the contract of Refrigeradora with Penguin might extend for another year.

I know the firm is not too highly regarded in the industry and do not believe that they have either the experience or contacts necessary to do a good job. For example, all of the other producers have long since been liquidated for last year's production. They did not end up at the end of the year with a large unsold inventory of small sizes on a declining market, and at a time when small sizes are most abundant. Obviously, the carrying of this inventory
236 has greatly increased your storage costs and interest charges. Of most importance, however, is the fact that all the small sizes should have been sold at prices at least ten cents a pound higher than the present market.

I have made brokerage arrangements with highly reputable firms and know that many of them would refuse to work with that firm.

I believe that Refrigeradora had a bad experience with another Chicago firm or Stamm Schulman. These gentlemen formerly worked for Morris Fisheries. The owner of Penguin also worked for Morris Fisheries prior to organizing Penguin. I do not know what the contractual relationship is between Reno and Penguin but if the former contract provided for cancellation, the withholding of funds by Penguin to assure extension of the contract seems to be very illegal and very close to blackmail. I would not be at all desirous of having this firm receive any merchandise or money belonging to Crest. I feel a keen responsibility to all of you gentlemen as well as the other organizers of Crest, and am sure you can appreciate the apprehension I would have in entrusting funds or merchandise in view of Penguins attitude on this matter.

I do not believe Penguin would agree to confine their sales to Chicago. I am sure also that their efforts, instead of building Crest to a larger organization would be directed towards blocking our aims and growth. I fail to see how Penguin can be anything but a great handicap, an additional expense, and a source of friction, and sincerely hope that the first year we will not be burdened with the problem of working with them in any way. I believe that relations with Penguin should be severed. If there is any assistance I can give you, I will be glad to do so.

Sincerely,

/s/ J. W. Willis.

237 UNITED STATES DISTRICT COURT.

* * (Caption—53-C-2482) * *

ANSWERS OF REFRIGERADORA DEL NOROESTE, S. A. TO THE DEFENDANT'S INTERROGATORIES.

Now Comes the plaintiff, Refrigeradora Del Noroeste, S. A., and for its answers to interrogatories numbered 1, 2, 3, 4, 5 and 10 heretofore propounded by the defendant herein states as follows:

238 1. Reno froze, from July 30th, 1953 to August 15th, 1954, 715,585.673 kilos, which were classified as shown in exhibit "A".

2. Reno toll-packed during the aforementioned period, 224,113.705 kilos, classified as shown in exhibit "B".

3. Reno sold its total production in Mexico. Classification is shown on exhibit "C".

4. Refer to reply No. 3.

5. Reno sold, in Mexico, its total production to those persons and companies listed on exhibit "D".

6. Reno is not in a position to know at what price or prices, was its production resold by the buyers.

7. As of August 15th, 1954, Reno's total production had been sold.

Reno feels the price or prices at which it sold its production are inconsequential, and that its revelation would be detrimental to its business.

Furthermore, Henry Appelbaum and or Penguin Frozen Foods, being in the shrimp business, they should be well acquainted with the current market prices.

10. In October 19, 1950, the directors of Reno were:

Lic. Francisco Alcalde
José Sáenz
Lic. Ricardo Torres Gaytán
Oscar Fraustro
Pedro Y. Pinsón
Alfredo Gutiérrez (Commissary)
Arsenio Farell (Secretary)

At the present date, the directors are:

Oscar Fraustro
Lic. Manuel Alvarado
Lic. Ricardo Torres Gaytán
Lic. Leonardo Alvarez
Lic. Francisco Alcalde (Deceased)
Tirso Carpizo (Commissary)
Lic. Enrique Asúnsolo (Secretary)

The new board was elected on October 16th, 1953.

Mazatlán, Sinaloa
Mexico } ss.

Pedro L. Pinson, being duly sworn, deposes and says: I am the duly authorized agent of Refrigeradora del Noroeste, S. A., that the foregoing answers to the interrogatories propounded by the defendant are true to the best of my knowledge and belief and are based upon the books and records of Refrigeradora del Noroeste, S. A. This answering plaintiff reserves the right to make any changes in said answers if at any time it appears that omissions or errors have been made therein.

Pedro L. Pinson.

El Licenciado Hector M. López Castro, Notario Público en el Estado, con ejercicio en esta Municipalidad, hace constar: Que el Sr. Pero L. Pinsón es de mi personal conocimiento hábil para contratar y óbligarse, y que la firma e antecede la puso en mi presencia, manifestandome que es la que usa para todos sus actos. Doy Fe, Mazatlán, Sinaloa, Mexico a los tres días del mes de mayo de mil novecientos cincuenta y cinco.

Licenciado Hector M. Lopez Castro,
(Seal) *Notario Publico.*

239 **Anexo "A".**

Clase Y Medida	Kilogramos
Crest	
U/12	39,937.212
U/15	94,407.768
16/20	99,054.897
21/25	25,868.808
26/30	7,140.396
31/40	3,377.052
41/50	687.204
50/0	303.912
	270,777.249
Mark	
U/12	20,883.744
U/15	40,885.236
16/20	61,047.756
21/25	14,435.820
26/30	3,159.324
31/40	1,143.072
41/50	208.656
50/0	24.948
	141,788.556
Brown	
U/12	2,875.824
U/15	6,255.144
16/20	15,098.076
21/25	22,684.536
26/30	28,969.164
31/40	36,269.856
41/50	6,350.400
50/0	—
	118,503.000
Brown C/Vena Verde	
U/12	5,933.088
U/15	9,115.092
16/20	12,904.920
21/25	10,344.348
26/30	7,429.968
31/40	13,594.392
41/50	27.216
50/0	—
	59,349.024

Brown De 2a	
U/12	—
U/15	15.876
16/20	117.936
21/25	449.064
26/30	172.368
31/40	283.600
41/50	83.916
15/0	—
	1,122.760
Pelado 5 Lbs.	
U/20	63,101.203
21/26	20,573.875
32/40	12,148.315
41/50	13,741.812
50/0	6,343.596
	6,320.916
	122,229.777
Pelado 3 Lbs.	
U/20	977.054
21/26	298.015
32/40	263.995
41/50	205.481
50/0	70.762
	—
	1,815.307
	715,585.673

240 Anexo "B".

Clase Y Medida

Crest	Kilogramos
U/12	15,998.472
U/15	32,498.172
16/20	31,992.408
21/25	8,223.768
26/30	2,568.108
31/40	1,081.836
41/50	362.880
50/0	170.100
	92,895.744

Mark	
U/12	8,078.616
U/15	13,143.060
16/20	16,604.028
21/25	3,955.392
26/30	1,004.724
31/40	328.860
41/50	11.340
50/0	—
	43,126.020

Brown	
U/12	548.856
U/15	1,546.776
16/20	3,628.800
21/25	5,159.700
26/30	8,241.912
31/40	11,185.776
41/50	1,891.512
50/0	—
	32,203.332

Brown C/Vena Verde	
U/12	1,002.456
U/12	2,013.984
16/20	3,628.800
21/25	3,440.556
26/30	1,295.028
31/40	1,458.324
41/50	9.072
50/0	—
	12,848.220

Brown De 2a	
U/12	—
U/15	2.268
16/20	29.484
21/25	77.112
26/30	34.020
31/40	102.160
41/50	83.916
50/0	—
	328.960
Pelado 5 Lbs.	
U/20	22,531.219
21/26	6,750.475
27/31	3,763.519
32/40	4,166.316
41/50	2,385.936
50/0	3,113.964
	42,711.429
Pelado 3 Lbs.	
U/20	
21/26	
27/31	
32/40	
41/50	
50/0	
	224,113.705

241 Anexo "C".

Clase Y Medida	Kilogramos
Crest	
U/12	23,938.740
U/15	61,909.596
16/20	67,062.489
21/25	17,645.040
26/30	4,572.288
31/40	2,295.216
41/50	324.324
50/0	133.812
	177,881.505
Mark	
U/12	12,805.128
U/15	27,742.176
16/20	44,443.728
21/25	10,480.428
26/30	2,154.600
31/40	814.212
41/40	197.316
50/0	24.948
	98,662.536
Brown	
U/12	2,326.968
U/12	4,708.368
16/20	11,469.276
21/25	17,524.836
26/30	20,727.252
31/40	25,084.080
41/50	4,458.888
50/0	—
	86,299.668
Brown C/Vena Verde	
U/12	4,930.632
U/15	7,101.108
16/20	9,276.120
21/25	6,903.792
26/30	6,134.940
31/40	12,136.068
41/50	18.144
50/0	—
	46,500.804

Brown De 2a	
U/12	—
U/15	13.608
16/20	88.452
21/25	371.952
26/30	138.348
31/40	181.440
41/50	—
50/0	—
	793.800
Pelado 5 Lbs.	
U/20	40,569.984
21/26	13,823.460
27/31	8,384.796
32/40	9,575.496
41/50	3,957.660
50/0	3,206.952
	79,518.348
Pelado 3 Lbs.	
U/20	977.054
21/26	298.015
27/31	263.995
32/40	205.481
41/50	70.762
50/0	—
	1,815.307
	491,471.968

242 Anexo "D".

Nombres	Domicilio	Kilogramos
Exportadores Asociados S. A. de CV.—	San Juan Letran 21-909 —Mexico	486,306.371
Sergio Infante—	Olas Altas 75-4—Ciudad.	2.268
Tomas de Rueda—	Calle Congeladores.—Ciudad.	2.268
Ciro Santoyo—	Comprado en planta	11.340
Gilberto Avilés—	Colonia de los Pinos.—Ciudad	4.536
Cámara Ncl. de Comercio—	Venus 20 sur.—Ciudad	18.144
Tomas de Rueda, Jr.—	Calle Congeladoras.—Ciudad.	4.536
Tomas de Rueda, Jr.—	Calle Congeladoras.—Ciudad	9.072
Otilio Cabello—	B. I. Rojo 25 Pte.—Ciudad.	2.268
E. N. Rosete—	B. Dominguez 57 sur.—Ciudad.	2.268
Restaurant "La Siesta"—	Olas Altas 75-5.—Ciudad	15.876
Restaurant "La Siesta"—	Olas Altas 75-5 —Ciudad.	4.536
Restaurant "La Siesta"—	Olas Altas 75-5 —Ciudad	2.268
Lic. Salvador Diaz—	Comprado en planta	4.536
E. N. Rosete—	B Dominguez 57 sur.—Ciudad	1.361
Margarita Rodriguez—	Comprado en planta	4.082
Francisco Alcalde—	México, D. F.	11.340
Justo Ornelas—	Hermosillo, Son.	4.536
Lic. R. Amrós—	México, D. F.	13.608
Ricardo Torres—	México, D. F.	9.072
José Luis Mendy—	Comprado en planta	2.268
Faustino Cevallos—	Comprado en planta	2.268
Jaime Tarragona—	Comprado en planta	6.804
José Chang—	Comprado en planta	2.268
Gabino Puente—	Comprado en planta	6.804
Moisés Freeman—	Comprado en planta	6.804
Andres Rice—	Comprado en planta	2.268
Guillermo Nájera—	Comprado en planta	2.268
Silvano Pérez Ramos—	Comprado en planta	2.268
Silvano Pérez Ramos—	Comprado en planta	9.072
Nacional Financiera, S. A.—	México, D. F.	13.608
Pesquera Olas Altas, S. A.—	Calle Congeladora.—Ciudad	4.536
Ricardo Sanchez—	Comprado en planta	2.268
Pesquera Olas Altas, S. A.—	Calle Congeladoras.—Ciudad	6.804
Pedro L. Pinson—	V. Guerrero 108 Ote.—Ciudad	13.608
Pedro L. Pinsón—	V. Guerrero 108 ote.—Ciudad	9.072
Pedro L. Pinsón—	V. Guerrero 108 ote.—ciudad	4.536
Pedro L. Pinsón—	V. Guerrero 108 ote.—Ciudad	4.536
Roberto Diaz Bonola—	Cipres No.—Ciudad	2.268
Sergio Infante—	Olas Altas 75-4—Ciudad	2.268
Yolanda Gutiérrez—	V. Carranza 34 sur.—Ciudad	2.268
E. N. Rosete—	B. Dominguez 57 sur.—Ciudad	2.268
E. N. Rosete—	B. Dominguez 57 sur.—Ciudad	2.268
Alfonso Patrón—	Carnaval 21 sur.—Ciudad	4.536
Crnl. M. de la Garza—	Comprado en planta	6.804
Pesquera Olas Altas, S. A.—	Calle Congeladoras.—Ciudad	4.536
Hector Ocampo—	H. Frias 51-A.—Ciudad	1.361
Gaspar Pruneda—	N. Heroes 9 sur.—Ciudad	2.268
Tomas de Rueda Jr.—	Calle Congeladoras.—Ciudad	4.536
Arturo Berlin López—	Comprado en planta	6.804
Alfonso Patron—	Carnaval 21 sur—Ciudad	2.268
Yolanda Gutiérrez—	V. Carranza 34 sur.—Ciudad	2.268
Yolanda Gutiérrez—	V. Carranza 34 sur.—Ciudad	2.268
Alejandro Saito—	Comprado en planta	1.361

Nombres	Domicilios	Kilogramos
Carmen Ch. de Herrasti	Comprado en planta	6.804
Gaspar Pruneda	N. Heroes 9 sur.—Ciudad	2.268
Roberto Gorostiza	Olas Altas 75-2.—Ciudad	24.948
Alfonso Patron	Carnaval 21 sur.—Ciudad	2.268
Guillermo Lepcowitz	México, D. F.	113.400
Guillermo Lepcowitz	México, D. F.	56.700
Banco de Mazatlán	Olas Altas 67 sur.—Ciudad	2.268
Rodolfo Sánchez Taboada	México, D. F.	22.680
Lic. Leonardo M. Alvarez	B. Dominguez 5 nte.—Ciudad	2.268
Crnl. M. de la Garza	Comprado en planta	2.268
Empleados del FF. CC. Pacifico	Comprado en planta	6.804
Arturo Berlin López	Comprado en planta	2.268
Empleados FF. CC. Pacifico	Comprado en planta	4.536
Empleados FF. CC. Pacifico	Comprado en planta	9.072
La. P. de Sentiez	Sn. Coseme 66-5—México, D. F.	9.072
		486,854.320

a la hoja siguiente.

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	de la hoja anterior	486,854.320
Lic. Roberto Amorós	Bolicar 19—Mexico, D. F.	4.536
R. Rodriguez Cosio	Sta. Margarita 328.—Mexico, DF. A	4.536
Clementina de Pinsón	México, D. F.	2.268
Pedro L. Pinson	V. Guerrero 108 Ote.—Ciudad.	4.536
Margarito Alonso	B. Dominguez 12 nte.—Ciudad	2.268
Pesq. Olas Altas, S. A.	Calle Congeladoras.—Ciudad	24.948
Juan F. Huerta	N. Heroes 4 sur.—ciudad	11.340
Restaurant "La Siesta"	Olas Altas 11.—Ciudad	22.680
Restaurant "La Siesta"	Olas Altas 11.—Ciudad	22.680
Hector Ocampo	H. Frias 51-A.—Ciudad	2.268
Agustin Alva Cejudo	5 de Mayo 29.—México, D. F.	24.948
Mr. and Mrs. A. W. Edelen	Fdo. de Croix 130.—México, D. F.	13.608
A. W. Edelen, Jr.	Fdo. de Croix 130.—México, D. F.	2.268
Juan Arias, Jr.	Comprado en planta	2.268
Abel Solórzano	Comprado en planta	2.268
Humberto Trujillo	Libertad 20 Pte.—Ciudad	4.536
Carmen Jarero	Comprado en planta	2.268
Delia Lopez O.	V. Guerrero 138 ote.—Ciudad	4.536
Bartolo González	Comprado en planta	4.536
Carmen Jarero	Comprado en planta	2.268
Bartolo González	Comprado en planta	9.072
Ciro Santoyo	Comprado en planta	4.536
Ramon Herrera	Comprado en planta	4.536
W. E. Shiele	Comprado en planta	22.680
W. R. Shiele	Comprado en planta	20.412
Juan Arias, Jr.	A. Serdan 19 sur.—Ciudad	4.536
Restaurant "La Siesta"	Olad Altas 11. p—Ciudad	22.680
R. Dinguer	Comprado en planta	9.072
Sr. Barrows	Comprado en planta	2.268
Tomas de Rueda, Jr.	Calle Congeladoras. Ciudad	2.268
Hector Ocampo	H. Frias 51-A.—Ciudad	6.804
Shirley Courts, S. A.	Sullivan 166.—México, D. F.	45.360
Ricardo Sánchez	Comprado en planta	2.268
Restaurant "La Siesta"	Olas Altas 11.—Ciudad	22.680
Tomas de Rueda, Jr.	Calle Congeladoras, Ciudad	2.268
Cámara de Comercio	Venus 20 sur	4.536

Nombres	Domicilios	Kilogramos
Manuel Alvarado O.	Sindicalismo 87-117—México, D. F.	9.072
Arturo Berlin Lopez	Comprado en planta	2.268
Crnl. M. de la Garza	Comprado en planta	22.680
Roberto Patron	Nicaragua y Venus.—Ciudad	9.072
Gaspar Pruneda	N. Heroes 9.—Ciudad	2.268
Adolfo Coronado	Zaragoza y Priv. Puebla.—Ciudad	2.268
Gaspar Pruneda	N. Heroes 9.—Ciudad	2.268
F. J. Krazel	Comprado en planta	6.804
Carmen Ch. de Herrasti	Comprado en planta	13.608
José Martinez Canteli	Comprado en planta	9.072
José Martinez Canteli	Comprado en planta	9.072
Tirso Rivera	Comprado en planta	2.268
Shirley Courts, S. A.	Sullivan 166.—México, D. F.	45.360
Tomas de Rueda, Jr.	Calle Congeladoras.—Ciudad	4.536
Shirley Courts, S. A.	Sullivan 166.—México, D. F.	43.092
Shirley Courts, S. A.	Sullivan 166.—México, D. F.	2.268
Shirley Courts, S. A.	Sullivan 166.—México, D. F.	45.360
Otilio Cabello	B. I. Rojo 25 ote.—Ciudad	2.268
Tomas de Rueda, Jr.	Calle Congeladoras, S. A.	2.268
Tomas de Rueda, Jr.	Calle Congeladoras, S. A.	4.536
Sergio Infante	Alas 75-4.—Ciudad	2.268
Ernest Castán	Comprado en planta	4.536
Ing. Robles Martinez	México, D. F.	2.268
Lic. Gutierrez Souza	México, D. F.	6.804
Humberto Trujillo	Libertad 20 Pte.—Ciudad	2.268
Sr. Colin	Comprado en planta	2.268
Humberto Trujillo	Libertad 20 Pte.—Ciudad	4.536
Gaspar Pruneda	N. Heroes 9.—Ciudad	4.536
Federico Landázuri	Comprado en planta	4.536
Guillermo Heimpel	Comprado en planta	6.804
Julio Orozco	Comprado en planta	13.608
Refugio de Rueda	Comprado en planta	6.804
Tomas de Rueda, Jr.	Comprado en planta	2.268
Shirley Courts, S. A.	Sullivan 166.—México, D. F.	68.040
		487.575.544

a la hoja siguiente.

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	de la hoja anterior.	487.575.544
Shirley Courts, S. A.	Sullivan 166.—México, D. F.	45.360
Luis Paniagua	Carnaval 72 sur.—Ciudad	4.536
Kodak	A. Flores 356.—ciudad	2.268
Empacadora Belmar	Escuinapa, in.	2.268
Shirley Courts, S. A.	Sullivan 166.—México, D. F.	45.360
Shirley Courts, S. A.	Sullivan 166.—México, D. F.	45.360
Shirley Courts, S. A.	Sullivan 166.—México, D. F	45.360
Shirley Courts, S. A.	Sullivan 166.—México, D. F.	45.360
Fausto Simancas	Comprado en planta	2.268
G. Levin	B. Juárez 28 sur.—Ciudad	2.268
Carmen Trujillo	Carnaval 31 nte.—Ciudad	22.680
Shirley Courts, S. A.	Sullivan 166.—México, D. F.	45.360
Tomás de Rueda, Jr.	Calle Congeladora.—Ciudad	2.268
Shirley Courts, S. A.	Sullivan 166.—México, D. F.	45.360
Jane de Pinsón	Colonia de los Pinos.—Ciudad	6.804
Shirley Courts, S. A.	Sullivan 166.—México, D. F.	45.360
Lic. Amorós y Sr. R. Cano	México, D. F.	9.072

Nombres	Domicilio	Kilogramos
Shirley Courts, S. A.	Sullivan 166.—México, D. F.	45.360
Pedro L. Pinsón	V. Guerrero 108 Ote.—Ciudad.	2.268
Hotel del Prado	México, D. F.	45.360
Sr. Smith	Comprado en planta	2.268
A. C. Edwards	Comprado en planta	4.536
Jorge Kuri	Comprado en planta	4.536
Victor Granados	Comprado en planta	2.268
J. A. Konyonn	Comprado en planta	4.536
Tomas Frothingham	Comprado en planta	4.536
Delia Lopez O.	V. Guerrero 138 ote.—Ciudad	2.268
Abarrotes S. de R. L.	M. Ocampo 5 ote.—Ciudad	22.680
Hector Ocampo	H. Frias 51-A.—Ciudad	6.804
Luis Paniagua	Carnaval 72 sur.—Ciudad	9.072
Pesquera Olas Altas, S. A.	Calle Congeladora.—Ciudad	6.804
R. Diaz Bonola	Comprado en planta	2.268
Pesquera Olas Altas, S. A.	Calle Congeladora.—Ciudad	4.536
Yate Malibu	Comprado en planta	2.268
Tirso Carpiso y Lic G. Souza	I. la Catolica 45-215—México, D. F	9.072
Pedro L. Pinson	V. Cuerrero 108 ote.—Ciudad	4.536
Pedro L. Pinsón	V. Guerrero 108 ote.—Ciudad	4.536
Pedro L. Pinsón	V. Guerrero 108 ote.—Ciudad	9.072
Oscar Levin	Independencia 1.—Ciudad.	2.268
Pesquera Olas Altas, S. A.	Calle Congeladora.—Ciudad	4.536
Shirley Courts, S. A.	Sullivan 166.—México, D. F.	45.360
Luis Paniagua	Carnaval 72 sur.—Ciudad	2.268
Dr. A. Tripp Flores	M. Escobedo 82 ote.—Ciudad	4.536
Ma. Luisa Herrera	Comprado en planta	6.804
Estrella Costera	Comprado en planta	2.268
Jesús Guizar	Comprado en planta	9.072
Estrella Costera	Comprado en planta	2.268
Hotel del Prado	México, D. F.	45.360
Carmen Ch. de Herrasti	Comprado en planta	4.536
Jorge Murúa	Comprado en planta	6.804
Alfonso Patron	Carnaval 21 sur.—Ciudad	4.536
Gral. R. Sánchez Taboada	México, D. F.	27.216
Pedro L. Pinsón	V. Guerrero 108 ote.	9.072
Sr. Gorostiza	Comprado en planta	4.536
Pedro L. Pinsón	V. Guerrero 108 ote.	9.072
Depto. Carros del FF. CC.	Comprado en planta	2.268
Pesquera Olas Altas, S. A.	Calle Congeladora.—Ciudad	4.536
Sr. Senties	Diana 33.—Ciudad	2.268
Shirley Courts, S. A.	Sullivan 166.—México, D. F.	45.360
Shirley Courts, S. A.	Sullivan 166.—México, D. F.	45.360
Juan F. Huerta	N. Heroes 7.—Ciudad	6.804
Shirley Courts, S. A.	Sullivan 166.—México, D. F.	45.360
Shirley Courts, S. A.	Sullivan 166.—México, D. F.	45.360
Pedro L. Pinsón	V. Guerrero 108 ote—Ciudad.	24.948
Tomas de Rueda, Jr.	Calle Congeladoras.—Ciudad	4.536
Shirley Courts, S. A.	Sullivan 166.—México, D. F.	45.360
Emilio Aun	5 de Mayo 111 nte.—Ciudad	9.072
Carlos Senties	Diana 33.—Ciudad	2.268
Alfa, S. A.	Carnaval y Escobedo.—Ciudad	2.268
Alfa, S. A.	Carnaval y Escobedo.—Ciudad	2.268
Federico Landázuri	Comprado en planta	2.268
		488.673.256

a la hoja siguiente

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Nombres	Domicilio	Kilogramos
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	de la hoja anterior.	488,673.256
Pedro L. Pinsón	V. Guerrero 108 Ote.—Ciudad.	4.536
Shirley Courts, S. A.	Sullivan 166.—México, D. F.	45.360
Shirley Courts, S. A.	Sullivan 166.—México, D. F.	45.360
Cementos del Pacifico SA.	Olas Altas 25.—Ciudad	2.268
Oficina de Pesca	Comprado en planta	4.536
Oficina de Pesca	Comprado en planta	2.268
Ernest Castan	Comprado en planta	4.536
Fns. de Nagin, S. A.	V. Carranza 25.—México, D. F.	22.680
Secretario de Marina	México, D. F.	6.804
Tomas de Rueda, Jr.	Calle Congeladora.—Ciudad.	13.608
Shirley Courts, S. A.	Sullivan 166.—México, D. F.	45.360
Shirley Courts, S. A.	Sullivan 166.—México, D. F.	45.360
R. Amorós y R. Cano	México, D. F.	9.072
Empacadora Belmar	Escuinapa Sin.	47.628
Empacadora Belmar	Escuinapa Sin.	303.912
Empacadora Belmar	Escuinapa Sin	4.536
Empacadora Belmar	Escuinapa Sin.	24.948
Empacadora Belmar	Escuinapa Sin.	181.440
Empacadora Belmar	Escuinapa Sin.	22.680
Empacadora Belmar	Escuinapa Sin.	27.216
Empacadora Belmar	Escuinapa Sin.	74.844
Empacadora Belmar	Escuinapa Sin.	79.380
Empacadora Belmar	Escuinapa Sin.	22.680
Empacadora Belmar	Escuinapa Sin.	90.720
Shirley Courts, S. A.	Sullivan 166.—México, D. F.	45.360
Lic. Gutiérrez Souza	México, D. F.	4.536
Sres. Saavedra y Equihua	México, D. F.	4.536
Pedro L. Pinsón	V. Guerrero 108 ote.—Ciudad.	15.876
Shirley Courts, S. A.	Sullivan 166.—México, D. F.	1,539.972
Shirley Courts, S. A.	Sullivan 166.—México, D. F.	2.268
Federico Landázuri	Comprado en planta	6.804
Restaurant "La Siesta"	Olas Altas 11.—Ciudad	13.608
Restaurant "La Siesta"	Olas Altas 11.—Ciudad	6.804
Restaurant "La Siesta"	Olas Altas 11.—Ciudad	6.804
Obsequios fin temporada	A empleados	2.268
Obsequios fin temporada	A empleados	9.072
Obsequios fin temporada	A empleados	2.268
Obsequios fin temporada	A empleados	4.536
Obsequios fin temporada	A empleados	2.268
		491,471.968

246 In answer to defendant's interrogatories numbered 6, 7, 8 and 9 and pursuant to this Court's order of May 12th, 1955, plaintiff states as follows:

247 6. As explained in reply No. 5, Reno sold its total production in Mexico. It is obvious that the buyers activities, both as to prices and volume of stocks, or on anything else, are outside its direct control. In order to obtain the information requested, Reno would have to in-

quire it from the various buyers shown in exhibit "D", and cannot foresee their willingness to submit it.

7. Reno replies with the contents of reply No. 6.

8. The letter in question was dated September 11th, 1953, and was addressed to Mr. Martinez Ostos, with copies sent to Messrs. Fraustro and Pinson. However, there were some differences between the original and the copy presented.

9. Nacional Financiera, S. A. is the Mexican Government Investment Bank. As such, it is the largest Investment Bank in Mexico, and has intervened and intervenes in the solution of the long term financing aspects of most of the country's industrial concerns. That is exactly the case with Reno. Nacional Financiera, S. A. has supplied most of the financing it has required; it acts as the Fiduciary Agent, in accordance with Mexican Laws, on Reno's mortgage bonds issue, and, as such, represents legally the holders of said mortgage bonds. In Reno's Board of Directors, two out of its five members, are officers of Nacional Financiera, S. A.

Mazatlan, Sinaloa, Mexico } ss.

Pedro L. Pinson, being duly sworn, deposes and says: I am the duly authorized agent of Refrigeradora del Noroeste, S. A., that the foregoing answers to the interrogatories propounded by the defendant are true to the best of my knowledge and belief and are based upon the books and records of Refrigeradora del Noroeste, S. A. This answering plaintiff reserves the right to make any changes in said answers if at any time it appears that omissions or errors have been made therein.

Pedro L. Pinson.

El Licenciado Hector M. López Castro, Notario Público en el Estado con ejercicio en esta Municipalidad, hace constar: Que el Sr. Pedro L. Pinsón es de personal conocimiento hábil para contratar y obligarse, y que la firma que antecede la puso en mi presencia, manifestandome que es la que usa para todos sus actos. Doy Fe Mazatlán, Sinaloa México a los veintitres días del mes de Mayo de mil novecientos cincuenta y cinco.

H. M. L. Castro,
Licenciado Hector M. Lopez Castro,
Notario Publico.

(Seal)

248 Proof of Service.

Received a copy of the above and foregoing answers of plaintiff to defendant's interrogatories this 27th day of May, 1955.

.....

One of the attorneys for defendant Henry Appelbaum.

249 DEFENDANT'S EXHIBIT NO. 77.

(Filed Mar. 27, 1956. Roy H. Johnson, Clerk.)

In the United States District Court.

* * (Caption—53-C-2482) * *

DEPOSITION OF OLIVER L. MORTON.

March 1, 1955.

Examination by Mr. Stanford Clinton.

250 Be It Remembered that pursuant to Notice hereto attached, on Tuesday, the first day of March 1955, at the hour of 11:30 a. m., at the Bank of America, 300 Montgomery Street, San Francisco, California, before Ruby Ann Puett, a notary public in and for the City and County of San Francisco, State of California, personally appeared

OLIVER L. MORTON, who, having been first sworn, gave the following testimony:

Direct Examination by Mr. Stanford Clinton.

Q. Will you state your name.
A. Oliver L. Morton.
Q. And where do you live, Mr. Morton?
A. 2245 Sacramento Street, San Francisco, California.
Q. What is your business or occupation?
A. Banker; assistant cashier, Bank of America.
Q. How long have you been so employed?
A. I have been with the bank for eight years, eleven months.

Q. How long have you been in your present position?
A. In my present position? I recently made a change in my position, about two weeks ago.
251 Q. In 1953 what position did you have?
A. In 1953 I was an assistant area administrator in the Latin American Regional Section.
Q. What were your duties in that position?
A. To assist the area and senior area administrators and the regional section head.
Q. Who was your section head?
A. Mr. Milo Hefferlin.
Q. The gentleman who testified this morning?
A. Yes, sir.
Q. Did you, in the year 1953, participate in any conferences with reference to the financing by the Bank of America of shrimp to be sold in the United States and produced in Mexico?
A. Merely as an observer. I did not participate. I merely attended the conferences.
Q. How many such conferences did you attend?
A. I don't recall the exact number. It was more than one but exactly how many I don't recall.
Q. The conferences that Mr. Hefferlin testified to this morning?
A. Yes, sir.
Q. And you hear all of his testimony?
A. Yes, sir.
Q. Is your recollection of what took place at those conferences the same as his?
A. Yes.
Q. Would your testimony be the same?
A. Yes, sir.
Q. Is there any respect in which your testimony would be different?
A. No, the situation as he presented it is exactly
252 as I remember it.
Q. With reference to any records of Crest, are you familiar with any such records other than those he testified to?
A. You mean exclusively to Crest Importing Company?
Q. Yes.
A. The only record I know he did not refer to is a copy of—I guess you would say the documents pertaining to—creating Crest Importing Company.

Q. Where are those records?
A. In the control document section of the bank.
Q. Can you produce them?
A. They can be produced.
Q. When were they delivered to the bank?
A. I can't say exactly but would say it was during the middle part of 1953.
Q. Would there be a letter of transmittal with respect to them?
A. I don't remember whether there was one or not. I don't remember just how we did receive them. Where they came from or where we got them, I can't say.
Q. Where did you say this file is where the corporate records would be contained?
A. It is a control document file.
Q. What kind of documents go into that file?
A. Any type of document that—I would say of legal importance that would control lines of credit. Any type of a document we don't want to have lost.
Q. Has that file been examined with reference to Crest?
A. Not to my knowledge.
Q. Has it been examined with reference to any of these transactions?
A. Not to my knowledge.
Q. Have you ever heard of Exportadores Associados, S. A.?
253 A. I don't recall hearing the name until this morning.
Q. Have you ever heard of the company we refer to as Reno?
A. Yes.
Q. When did you first heard of Reno?
A. During the early part of 1953 when I assumed my duties in the Latin American Regional Area Section, I would say. I used to receive the documents they would send to us to be processed for advances or collections that we made to Nacional Financiera. As I recall, they were on the letterhead of Refrigeradora Del Noroeste.
Q. Outside of that you had not hear of them until—
A. I was aware of collection difficulties they were experiencing.
Q. Do you recall if Arturo deCima was present?
A. He was present but didn't participate.
Q. Who did the principal talking?

A. Mr. Fraustro and Mr. Pinson did the principal talking for the Mexican firms and Nacional Financiera.

Q. What did Mr. Pinson say in these conferences?

A. Well, that would be difficult to remember.

Q. Do you remember anything that he said?

A. There were primarily conversations discussion the needs that they wanted for financing the shrimp. They were presenting their credit needs to us and we were receiving the information.

Q. What, if anything, did Pinson say about the setup as to what producers would be involved?

A. I don't recall his specifying any particular producer. I know the word "producer" was used, but as to who they were, I have no recollection.

Q. Did Fraustro make any references to them?

A. I don't recall Mr. Fraustro making any specific references.

Q. What about Mr. Willis?

A. As I recall, the only comments Mr. Willis had 254 were in connection with how they were going to meet the maturity of the drafts, that's all.

Q. The discussion was primarily the mechanics of financing?

A. That is correct.

Q. Was the name "Crest Importing Company" used during these discussions?

A. I believe it was. I can't say with definiteness, but I believe it was.

Q. When did you first hear the name "Crest Importing Company"?

A. Well, I don't know exactly when I first heard of it. The first I was aware of the name "Crest Importing Company" was when we received word from our San Diego main office that they had established a commercial account on their books.

Q. Did you see Defendant's Exhibit 1?

A. Yes, sir.

Q. As it came in?

A. Yes sir.

Q. Would that be the first time you had heard about it?

A. May I see it? No, I believe the account was opened prior to this time.

Q. Do you have a record of those accounts up here?

A. No, sir.

Q. Only in San Diego?

A. That is correct.

Q. Do you have anything to do with servicing this account at present?

A. No.

Q. You are out of that division?

A. Yes, sir.

Q. What other officials participated in these conferences that you know of, besides yourself and Mr. Drath?

255 A. The only officials from the Bank of America were Mr. Drath, Mr. Hefferlin and myself, and I don't know whether I was present at all the conferences or not. I was present at some. At the conferences I listened in on, Mr. Drath and Mr. Hefferlin were the only Bank of America officials present.

Q. What about Montara?

A. Tony Montara? At that time he was traveling for the bank. I don't remember whether he was in Cuba or in Mexico. He was out of the country, I know.

Q. Would you know whether he had any discussions with Pinson when he was out of the country?

A. Not to my knowledge. I don't know whether he would or not.

Q. Pinson testified, for your information, that during the days he was here he talked with Montara. Is that possible or could he have erred on that score?

A. I certainly wouldn't want to conflict with anything Mr. Pinson said, but to my knowledge Montara was not in San Francisco at that time.

Q. That is your definite recollection?

A. A definite recollection.

Q. He was in Mexico City?

A. He could have been, or in Cuba.

Q. He was a migratory representative of the bank in the Latin American countries?

A. Yes, the Mexico-Cuba area.

Q. Mexico was in his jurisdiction, was it not?

A. I would not say he was the official representative in Mexico. He may have made a trip there for a specific reason but that would have been the only reason at that time.

Q. When was the last time you saw Mr. Willis?

A. At that conference.

256 Q. When was the last time you saw Pedro Pinson?

A. At that conference.

Q. Arturo deCima?

A. At that conference.
Q. Coppel?
A. At that conference.
Q. Oscar Fraustro?
A. Just a moment. I remembered something. Mr. deCima, as I recall, on second thought, did visit the bank some time—I don't remember whether it was very late in 1953 or the early part of 1954—he came into the bank to cash a check, as I recall, in order to make a purchase here in the city. I don't remember what it was—
Q. It was unconnected with this transaction?
A. It was not connected with this transaction.
Q. This conference was in 1953?
A. Yes, sir.
Q. Can you go and get those documents to which you refer?
A. Crest Importing creation papers? Yes, sir.
Q. Are there any other papers down there in relation to this transaction? Will you get all of them down there? Anything pertaining to Reno—
A. Anything there pertaining to this would be in the same folder.
Q. Reno or Nacional Financiera, as pertains to this transaction.
A. That is correct.
Q. Or Crest Importing. We will wait.
Mr. Clinton: Can we stipulate that in the control document files of the Bank of America, for Nacional Financiera, it is indicated that the borrower is Nacional Financiera 257 and that there is contained in the folder the bylaws of Crest Importing Company, Inc., and this document, which I will have introduced.
Mr. Kohn: Whatever is in the files, I will stipulate, for what it is worth.
Mr. Clinton: These entire files, then, contain the bylaws of Crest Importing Company.
Mr. Kohn: I don't see why we should clutter up the records.
Mr. Clinton: I just want to put in that this file, this control document file in which the borrower is designated as Nacional Financiera—there are the bylaws of Crest Importing Company and a communication from Nacional Financiera dated 9 August 1952, addressed to the Bank of America and signed by whom?
Mr. Morton: Mr Fraustro.

Mr. Clinton: Together with a translation from the Bank of America. Those two documents we will ask to have photostats made for us.

Witness Excused.

At the conclusion of the deposition, it was Stipulated that the depositions of Mr. Hefferlin and Mr. Morton need not be transmitted to the Clerk of the United States District Court under seal, and that signatures and reading are waived.

258 DEFENDANT'S EXHIBIT NO. 78.

(Filed Mar. 12, 1956. Roy H. Johnson, Clerk.)

August 7, 1953.

Nacional Financiera S. A.
Venustiano Carranza No. 25
Mexico, D. F., Mexico

Attention: Mr. Raul Martinez Ostes, Sub-Director

Gentlemen:

During the past two days we have had the pleasure of a visit from Mr. Oscar Fraustro Martinez. We have discussed the details of our line of credit with him and the gentleman representing the individual packers making up the group of shrimp packers which you are sponsoring.

At the suggestion of your representative, I am pleased to outline the conditions under which this facility will be available to your good selves.

The line of credit which we hold at your disposal for financing shrimp will remain, as formerly, $1,700,000. However, the sub-limit within the facility will be increased from $200,000 to $300,000. In case the entire $300,000 pre-season facility is used by your good selves, reimbursement will be made to us at the rate of 7½¢ per pound of all shrimp shipped. If less than $300,000 is borrowed against pre-season notes, then the reimbursement may be less than 7½¢ per pound on certain shipments. It is understood that any unpaid balance remaining on the notes representing the pre-season financing will be charged to your esteemed account on June 30, 1954.

It is a pleasure to express our agreement to the suggestion that shipments to be financed under this facility be made on straight bills of lading consigned to Crest Importing Company. These documents will be released to Crest under a Trust Receipt. It is understood that if any shrimp is unsold at the maturity of the relative acceptance, the financing may be carried for an additional 90 days on a note basis, upon surrender to us of the warehouse receipt, which we will release to Crest against a Trust Receipt.

Our advances will be for 75% of the invoice value of the merchandise. We understand that the shrimp will be invoiced in accordance with prevailing market prices, and that the original documents sent to us will include a draft on Crest, drawn at 90 days sight for 75% of the invoice value. The documents will be released to Crest upon acceptance of this draft and signature of a Trust Receipt.

259 Our acceptance commission and discount, amounting to 4½% per annum, will be charged to Crest Importing Company, San Diego. Accordingly, the face amount of the drafts for 75% of invoice value will be credited to the account of Nacional Financiera. In accordance with your request, interest at 4½% per annum on the notes representing pre-season financing will be charged monthly to the account of Nacional Financiera under advice.

In order that we may be in complete agreement regarding the modus operandi of this facility, I would like to outline the handling of the hypothetical transaction as we envisage it.

The Nacional Financiera will wire us in San Francisco confirming that documents covering say $30,000 invoice value of shrimp are being sent to our San Diego Office, accompanied by a draft on Crest Importing Company representing 75% of the value, or $22,500. We will immediately fill in one of the blank drafts which we hold in safekeeping for Nacional Financiera, applying the reference "BAS." The amount will be $22,500 and the usance may be any period up to 90 days. This draft will be accepted and discounted, the 4½% p. a. financing charge being debited to Crest Importing Company at our San Diego Office, and the face amount or $22,500 will be credited to the account of Nacional Financiera here.

In the meantime, the documents are to be air mailed by you direct to our San Diego Main Office. When they arrive our said office will place the collection for $22,500 on its

books, and deliver the documents to Crest against Trust Receipt and acceptance of the accompanying draft at 90 days sight for $22,500. This completes the first step of each transaction.

Not later than one day before the maturity of this draft (in case the relative shipment has not been sold, the warehousing procedure mentioned previously will apply), Crest will pay to our San Diego Main Office a sum representing approximately 88% of the invoiced value of the shipment, accompanying its remittance by a schedule showing application of the funds as follows:

(1) $22,500 to pay Nacional Financiera's draft accepted by the Bank of America.

(2) $..... representing 2½¢, 5¢, or 7½¢ per pound of shrimp to be applied against the pre-season financing.

(3) $..... balance to be credited to the account of Nacional Financiera under advice to them and to Crest.

A mutually satisfactory arrangement will be discussed with Crest Importing Company to make the acceptance method of financing as economical as possible for your good selves. We believe that the foregoing summarizes the conditions governing this arrangement as concluded during our discussions. If you have any comments or suggestions we will be happy to receive them, in order that this faciiity may be of benefit to all the parties concerned.

260 Your excellent cooperation in all matters pertaining to our relationship is highly appreciated, and we wish to cooperate to the fullest extent.

Very sincerely yours,

Henry W. Drath,
Vice President.

HWD:sa-5
MH

261 DEFENDANT'S EXHIBIT NO. 79.

(Filed Mar. 12, 1956. Roy H. Johnson, Clerk.)

(Letterhead of Bank of America.)

March 4, 1953.

Mr. Henry W. Drath
Vice President
Bank of America National Trust & S. A.
International Banking Department
300 Montgomery Street
San Francisco, Cal.

Dear Henry:

The Government of Mexico is making an effort to organize, on sound commercial basis, the exportation of shrimp which up to now has been handled in a chaotic manner.

The project includes to group under Nacional Financiera, which already control Refrigeradora del Noroeste, S. A., most of the shrimp fishermen, packers and exporters, after this rationalize the fishing and the distribution of the existing facilities. As a matter of fact the Pacific coast has now a surplus of freezing plants while the Mexican shrimp is sold alive and smuggled to Texas fishing boats for lack of refrigerating plants in Campeche.

Nacional Financiera also plans the organization of an United States Corporation to be managed by an American citizen, which will have the job of distributing the Mexican shrimp through all the year by means of warehousing inventories in cities like San Francisco, Los Angeles, Chicago, New York, Philadelphia and San Louis Missouri. This not only will reduce cost of sales of the Mexican shrimp but will also bring an increase in the price for the product which is now sold by competing Mexican interests to one or two single buyers in the United States.

Nacional Financiera will give its financial assistance for those purposes and on this connection they would like us to put at their disposal:

1. 700,000 dollars for the re-equipment of the fishing fleet and regrouping of the refrigeration facilities during

the dead season from May to September. Such loan to be repaid with a discount of 5 to 8 cents per pound of all shipments from the proceeds of the collections.

2. 1,000,000 dollars (initially) for the transport and warehousing of shrimp in the United States (with public warehouses certificates). All advances never to be over 70% of the value of the collateral.

262

This could be handled through acceptance financing, Nacional Financiera drawing on us a 20,000 dollars—draft to come attached to the documents covering each carload of shrimp shipped and which value is around 30,000 dollars.

In account of the reduction of the Import and Export Bank interim financing and of the letters of credit now handled by Nacional Financiera, the whole deal can be included on section 2 of the line of 15 million dollars just enlarging the portion a) to the amount of 1,700,000 dollars and making provision for the acceptance financing of the shipments of shrimp. Interest on the 700,000 dollars will be handled on note basis. Acceptance commission on the drafts covering shipments, 2% per annum plus discounts at prevailing rates.

Considering that this type of financing is within our lending policy plus the collateral benefit represented by the handling all over the United States of collections amounting annually to many million dollars, it is recommended to process rapidly the above amendments in order to take care of this new business of Nacional Financiera.

Very sincerely yours,

Juan March.

263 DEFENDANT'S EXHIBIT NO. 80.

(Filed Mar. 12, 1956. Roy H. Johnson, Clerk.)

(Letterhead of Bank of America.)

August 4, 1953.

From: San Diego Main Office #50

Subject: Nacional Financiera

Mexico D. F.
Crest Importing Company, Inc.

Mr. Henry W. Drath, Vice President
International Banking Department
San Francisco Headquarters

Dear Mr. Drath:

You have an appointment, August 5th, at 2:30 P. M. with Jack Ellis and representatives of the Crest Importing Company, Inc. and the Nacional Financiera, S. A. They were here today and provided us with signature cards for the account which was established on July 13th.

Just in case you have not been informed, the gentlemen who will be calling on you tomorrow are:

Oscar Fraustro, C. P. T.
Contralor General
Nacional Financiera, S. A.

Isaac Coppel
Olas Altas Y Angel Flores, Mazatlan

Pedro L. Pinson
Colonia de los Pinos, Mazatlan

Arturo De Cima
Venustiano Carranza 76, Mazatlan

The latter three gentlemen represent the Crest Importing Co., Inc. and each are shrimp producers.

They hope to retain their bank account in San Diego as their headquarters will be here. They also hope to work out with you, a procedure whereby advances on drafts can be handled through this office.

We shall be glad to cooperate in any way possible, and if you feel that we can handle the negotiations of the drafts, sending them to you on a cash letter or in any way you wish, we shall be glad to do so.

Sincerely yours,

K. A. Nairne,
Vice President.

KAN:mha

264 DEFENDANT'S EXHIBIT NO. 82.

(Filed Mar. 12, 1956. Roy H. Johnson, Clerk.)

August 7, 1953

Mr. Oscar Fraustro Martinez, Controller General
Nacional Financiera
Venustiano Carranza No. 25
Mexico D. F., Mexico

Subject: Line of Credit

Dear Mr. Fraustro:

In accordance with your request during your visit in San Francisco, I am pleased to describe the facilities within the line of credit we are privileged to make available to your esteemed institution. They are as follows:

1. Regular line: $5,000,000 for the confirmation of documentary sight letters of credit. These credits are to be reimbursed within nineteen days of receipt of our advice of negotiation. Negotiations of less than $50,000 are to be debited immediately to your account.

Rates: 1/20% confirmation commission for each three months period; 1/10% negotiation commission.

2. Interim financing line: $15,000,000 available for the issuance of documentary sight letters of credit and interim financing up to 90 days providing the purchases fall within credit lines made available to Nacional Financiera by the Export Import Bank or the International Bank for Reconstruction and Development. Certificates are to be provided by Nacional Financiera showing that the transactions are so authorized.

Interest rate: 3½% p. a.

Letters of credit: 1/20% confirmation commission—1/10% negotiation.

The following sub-facilities are authorized within the interim financing line:

(a) $1,700,000 for advances on documentary shrimp collections of Mexican companies designated by Nacional Financiera on Crest Importing Co. Financing is to be on an acceptance basis for up to 90 days. We are prepared to consider renewal of occasional acceptances for an additional 90 days if required by market conditions. Acceptances not to exceed 75% of the value of shipment. Nacional Financiera is to authorize Bank of America NT&SA to charge their account for any outstanding on June 30, 1954, on expiration of the facility.

265 $300,000 is available within the $1,700,000 for the discount of notes maturing June 30, 1954. This amount to be repaid on a monthly basis commencing July 1953 in amount up to 7½¢ per lb. for each shipment.

Rate: 4½% p. a.

(b) $5,000,000 available for up to 180 day acceptance financing for payments negotiated under specific line facility No. 4 described below in favor of Ferrocarril del Sud Pacifico S. A.

Rate: Acceptance commission 2% plus current rediscount rate.

3. Specific term loan of $6,875,000 for development of Highways in Mexico repayable $625,000 monthly during 1953 and $312,500 monthly during 1954.

Interest rate: 5% p. a.

4. $5,000,000 for letters of credit in favor of Ferrocarril del Sud Pacifico for the purchase of rails and boxcars in the United States. This credit to be available on a sight letters of credit basis with provisions for 180 day acceptance refinancing of negotiations within the provisions of the interim financing line (facility No. 2 Section B).

Acceptance commission 2% plus current discount (quarterly).

Letters of credit: 1/20 confirmation commission
1/10 negotiation commission

Perhaps some explanation should be made of the facilities within the $15,000,000 interim financing line. If $1,700,000 is set aside for the shrimp financing, and if an additional amount of $5,000,000 is utilized for 180 day acceptance financing of negotiations under the Sud Pacifico line (facility #4) only $8,300,000 will be available for interim financing. Of course, any unused portion of the shrimp

financing or the 180 day refinancing of Sud Pacifico letters of credit, is automatically available for interim financing.

If your interpretation of the lines is different from ours, please do not hesitate to communicate with us in order to eliminate any possible mis-understanding.

We appreciate this opportunity of discussing this matter with you, and assure you of our desire to serve you to your complete satisfaction at all times.

Cordially yours,

Henry W. Drath,
Vice President.

CER/Mr-5 Juan J. March
cc:Bemerint

266 DEFENDANT'S EXHIBIT NO. 83.

(Filed Mar. 12, 1956. Roy H. Johnson, Clerk.)

International Banking Department
San Francisco, California

September 18, 1953

Subject: Nacional Financiera, Mexico
Shrimp Facility Within Credit Line

Following is the proposed operation of subject's recently approved shrimp facility, as between Bank of America, San Diego Main Office, International Banking Department (#661), Crest Importing Company, and Nacional Financiera.

1. Pre-season notes will be sent by Nacional Financiera to #661 for discount.

(a) #661 will advance the amount of the note, crediting Nacional Financiera, quoting relative reference numbers.

(b) Nacional Financiera's account at #661 will be charged monthly for interest accrued on these notes.

(c) Crest will remit partial payments on the notes to SDMO on the basis of 2½¢, 5¢, or 7½¢ per pound of shrimp sold, furnishing detailed instructions for application of the funds. SDMO will remit same by entry letter to #661 (Attention Mexican Desk), transmitting instructions for application.

(d) Any unpaid balance on notes remaining as of June 30, 1954 will be charged to Nacional Financiera.

2. Acceptances and Collections.

(a) Nacional Financiera will advise #661 by wire of each collection forwarded, indicating amount of accompanying draft and refinancing desired. #661 will fill in, accept, and discount one of Nacional Financiera's blank drafts, completing the usance for any time up to 90 days' sight. Nacional Financiera or Crest will advise #661 of the usance desired in each case. A BAS reference number will be applied to each transaction, and copies of advices will be sent to Nacional Financiera, SDMO, and Crest. Charges of 4¼% p. a. will be debited to Crest at SDMO. SDMO's share of earnings will be adjusted internally.

(b) The relative documentary collections will be forwarded by Nacional Financiera to SDMO. The latter will set up its collection record, forwarding a copy to #661 (Attention Mexican Desk).

(c) Documents will be delivered to Crest against acceptance of the relative draft and signature of a trust receipt in duplicate; original to be held by SDMO, duplicate sent to #661.

267 (d) As Crest remits funds to cover maturing acceptances, SDMO will advise #661 in order that the original and copy of the relative trust receipt may be cancelled at the respective offices. Bank is under no obligation to maintain records of merchandise represented by trust receipts during the first 90 days that each shipment is financed.

(e) Total dollar amount of outstanding trust receipts must balance with dollar amount of outstanding collections at SDMO and acceptances at #661.

(f) As Crest pays SDMO for maturing acceptances or pre-season notes, SDMO will remit by entry letter to #661 (Attention Mexican Desk) with detailed instructions for application of funds.

(g) On the 30th of each month, SDMO will advise #661 as to total amount of outstanding collections on Crest as a verification of the acceptance portfolio at #661.

(h) A condition of this financing is the understanding that any liabilities outstanding on June 30, 1954 may be charged to Nacional Financiera's account.

3. Length of Financing.

(a) The original financing will be at any usance up to 90 days, as requested by Nacional Financiera or Crest.

Any acceptance originally drawn for less than 90 days may be extended, upon request, for the difference between its original tenor and 90 days, without additional documentation. SDMO will advise #661 immediately of any such requests by Crest.

(b) If the merchandise is unsold after 90 days, Crest will be granted an extension up to an additional 90 days upon request. Such request must be accompanied by (1) a warehouse receipt in the name of Bank of America covering relative merchandise, (2) consent of the Mexican exporter, (3) evidence that a notice of intent to engage in trust receipt financing has been filed. All charges to be for account of Crest.

(c) SDMO will immediately advise #661 with full details whenever an extension beyond 90 days is requested. #661 will then pay the relative maturing acceptances by debit to an advance account in Nacional Financiera's name.

268 (d) Thereafter the procedure will remain identical with that under Item 2 except that, as merchandise is sold, Crest will remit proceeds to SDMO. The latter will reduce the relative trust receipt and remit funds to #661 by entry letter with instructions to do likewise on the relative trust receipt copy and advance account.

International Banking Department #661
San Francisco, California.

MH:YC-5

269 DEFENDANT'S EXHIBIT NO. 84.

(Filed Mar. 12, 1956. Roy H. Johnson, Clerk.)

Translation

International Banking Department #661.

Translation of Letter
To Bank of America. 300 Montgomery Street. San Francisco 20, Cal.
From Nacional Financiera, S. A. Apartado No. 353. Mexico, D. F.
Dated August 9, 1952.

Gentlemen:

We have been advised that Refrigeradora Del Noroeste, S. A., has solicited a credit from your institution.

In case such credit is granted, we wish to inform you that regarding note #1 dated August 7 and maturing May 31st for $120,000.00, if at maturity any amount still remains outstanding, we authorize you to charge our account with your institution.

With regards to the credit for $380,000.00 which should be liquidated at the close of the 1952-53 shrimp season, which generally ends by August 31st, we authorize you to also charge our account with any amount that is outstanding on that date.

We remain,

Yours sincerely,
Nacional Financiera, S. A.
(signed.)

OF/bme.
Translated by A. F. Montero/mcf-3
Checked by .....

It is understood and agreed that the foregoing translation has been made without any representation or warranty of any kind or character as to its adequacy, accuracy or completeness and that no responsibility or liability is assumed in the event of any error or omission.

Translated for .....
Received

Note to Translator: If translation requires more space, use kranilla and attach.

270 Nacional Financiera, S. A.
Apartado No. 353 V. Carranza No. 25
Zona 1 Correo Aereo

Cable "Nafin" Entrega Inmediata
Mexico, D. F.
Contraloria

Agosto 9 de 1952.

Bank of America,
300 Montgomery Street,
San Francisco 20, Cal.

Muy señores nuestros y amigos:

Estamos enterados de que Refrigeradora del Noroeste, S. A., ha solicitado un crédito a esa Institución de cuya solicitud nos ha enviado copia.

En caso de que dicho crédito sea concedido manifestamos a ustedes que por lo que respecta al Pagaré No. 1 del 7 de agosto actual, con vencimiento al 31 de mayo de 1953 por Dls. 120.000.00, si a la fecha de su vencimiento quedare algun seldo insoluto, los autorizamos a cargarnoslo en la cuenta de cheques que llevan a esta Institución.

Por lo que se refiers al crédito de Dls. 380.000.00 y que deberá quedar liquidado al terminarse de vender el camarón producido en la temporada 1952-1953, que normalmente termina el 31 de agosto, los autorizamos también a que si en caso de que en esa fecha quedare pendiente algun saldo, nos lo carguen en la misma Cuenta Corriente.

Sin otro particular nos es grato repetirnos atentos amigos y seguros servidores.

"Nacional Financiera", S. A.

271 DEFENDANT'S EXHIBIT NO. 87.

(Filed Mar. 12, 1956. Roy H. Johnson, Clerk.)

	Oct. 1, 1950 to Apr. 30, 1954	Oct. 1, 1951 to Apr. 30, 1952	Oct. 1, 1952 to Apr. 30, 1953	Oct. 1, 1953 to Apr. 30, 1954
Total Sales	1,297,232.44	750,193.76	1,197,207.90	843,751.54
Fisher Fish Co.	231,774.83	238,585.05	414,379.04	108,385.86*
Atlantic Fish & Oyster	47,946.20	2,456.80	33,769.24	6,629.80
Baraboo Frosted Foods	3,927.50	29,558.50	37,073.50	54,675.15
Beatrice Creamery	18,633.15	56,473.50	55,702.00	23,241.75
Edward Boker Co.	19,314.00	19,181.40	31,806.18	18,023.05
Booth Fisheries Union	358,402.61	129,698.30	14,508.00	8,746.48
Foreman Beaton Co.	20,630.00	13,453.56	50,637.50	3,904.20
A. W. Huss Co.	6,121.20	18,812.00	23,076.50	24,783.01*
Independent Fish Co., St. Louis	61,939.00	138.60	4,455.00	0
Liberty Fish Co.	133,324.50	76,588.50	50,566.90	0
Live Fish Co.	82,513.88	27,649.20	23,053.00	0
Slade Gorton Co.	9,524.50	20,967.50	81,347.50	52,284.41
Victor Ventimiglia	0	0	47,802.42	0
Net Profit	60,414.61	13,493.50	9,481.88*	37,004.53
	9/1/50 to 4/30/51	9/1/51 to 4/30/52	9/1/52 to 4/30/53	9/1/53 to 4/30/54
Net Profit	60,414.61	14,543.40	16,893.76*	35,956.56

272 Guarantee.

Exportadores Asociados, S. A., pursuant to authority granted by its Board of Directors according to the laws of the Republic of Mexico in such cases applying, as the sole stockholder of Crest Importing Company, Inc., a California, United States of America, corporation, does hereby approve and ratify the employment contract dated the ..... day of ....., 1953, between the said Crest Importing Company, Inc., a corporation, and J. W. Willis, a copy of which is attached hereto and by this reference made a part hereof, and as consideration to the said J. W. Willis for inducing him to leave his prior employment and become General Manager of the said Crest Importing Company, Inc., a corporation, and because of financial benefits which Exportadores Asociados, S. A. expects to realize because of the employment of the said J. W. Willis, does hereby unconditionally and irrevocably guarantee the payment of the salary to the said J. W. Willis, provided in said Contract of Employment, for a period of two (2) years and six (6) months, provided the said J. W.

Willis shall faithfully perform the conditions and provisions on his part agreed in said Contract of Employment, and further agreeing with the said J. W. Willis that if for any reason whatsoever, other than the failure of the said J. W. Willis to comply with the provisions on his part agreed in said agreement, for any period of the first two (2) years and six (6) months of the term of his employment, upon demand. Exportadores Asociados, S. A. will forthwith pay said salary to J. W. Willis on behalf of the said Crest Importing Company, Inc., a corporation.

In witness whereof, Exportadores Asociados, S. A. 273 has set its hand and seal at ....., Republic of Mexico this ..... day of ....., 1953.

Exportadores Asociados, S. A.

(Corporate Seal) By .....

President

.....

Secretary

Nacional Financiera, S. A. does hereby acknowledge that it has read the foregoing Guarantee on the part of Exportadores Asociados, S. A. and does further acknowledge that Exportadores Asociados, S. A. has deposited with us certificates of participation in the total amount of $..... for the purpose of guaranteeing the payment of the agreed salary to J. W. Willis by Crest Importing Company, Inc. a California corporation, United States of America, and further that the money represented by the said certificates of participation will not be used for any purpose whatsoever other than for the payment to J. W. Willis, as provided in the Contract of Employment, a copy of which is attached hereto, and further that upon the failure of either Crest Importing Company, Inc., a corporation, or Exportadores Asociados, S. A. to make any payment of salary when due to the said J. W. Willis, we, upon his demand, will pay the same out of the said funds deposited with us for this purpose.

Nacional Financiera, S. A.

By .....

274 DEFENDANT'S EXHIBIT NO. 89.

(Filed Mar. 12, 1956. Roy H. Johnson, Clerk.)

Financial Statements

Penguin Frozen Foods

August 31, 1954.

Alexander Grant & Company,
Chicago.

275 Financial Statements

Penguin Frozen Foods

August 31, 1954

276 (Letterhead of Alexander Grant & Company,
Chicago 2, Illinois.)

Members of the Firm
Penguin Frozen Foods

We present financial statements of Penguin Frozen Foods (a partnership) as at August 31, 1954. Since we did not apply the generally accepted auditing procedures necessary for a formal expression of opinion on our part, these statements are accordingly submitted without such opinion.

Alexander Grant & Company.

Chicago, Illinois,
September 15, 1954

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Penguin Frozen Foods

BALANCE SHEET

August 31, 1954

(Presented subject to the accompanying letter dated September 15, 1954)

ASSETS

Current Assets			
Cash		$ 37,222.99	
Accounts receivable from customers	$164,203.61		
Less allowance for doubtful accounts	3,384.44	160,819.17	
Due from Prawns, Inc.		34,345.44	
Inventory—at the lower of cost or market		179,623.91	
Prepaid expenses and sundry deposits		6,081.40	$418,092.91

LIABILITIES

Current Liabilities			
Accounts payable			
Trade	$222,482.43		
Partner	17,076.31	$239,558.74	
Accrued expenses		1,423.48	$240,982.22
Capital			
Partners' capital			177,110.69
			$418,092.91

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Penguin Frozen Foods

COMPARATIVE STATEMENT OF EARNINGS

Months of August 1954 and 1953 and eight months ended August 31, 1954 and 1953

(Presented subject to the accompanying letter dated September 15, 1954)

	Month of August			Eight months ended August 31,		
	1954	1953	Increase decrease*	1954	1953	Increase decrease*
Sales						
Gross sales, less returns, allowances and discounts	$242,540.71	$ 92,367.91	$150,172.80	$1,527,980.40	$1,146,501.71	$381,478.69
Cost of Goods Sold						
Inventory—beginning of period	130,618.08	104,830.51	25,787.57	322,014.63	42,983.77	279,030.86
Purchases—net	262,740.17	54,250.40	208,489.77	1,286,198.99	1,113,592.52	172,606.47
Freight, storage and insurance	18,975.25	199.40	18,775.85	89,967.65	5,715.94	84,251.71
	412,333.50	159,280.31	253,053.19	1,698,181.27	1,162,292.23	535,889.04
Inventory—end of period	179,623.91	71,449.18	108,174.73	179,623.91	71,449.18	108,174.73
	232,709.59	87,831.13	144,878.46	1,518,557.36	1,090,843.05	427,714.31
Gross profit	9,831.12	4,536.78	5,294.34	9,423.04	55,658.66	46,235.62*
Selling and Administrative Expenses						
Salaries	2,160.00	940.00	1,220.00	14,935.00	8,205.00	6,730.00
Advertising	282.05	—	282.05	457.00	358.00	99.00
Bank charges	18.46	—	18.46	88.75	84.25	4.50
Bonuses	—	25.00*	25.00	—	1,325.00	1,325.00*
Commissions	200.00	8.65	191.35	485.00	2,260.75	1,775.75*
Dues and subscriptions	—	—	—	55.00	612.00	557.00*
Office expenses	306.64	193.38	113.26	1,530.75	1,125.60	405.15
Professional services	—	—	—	2,123.95	1,768.00	355.95
Provision for doubtful accounts	242.67	92.37	150.30	1,528.91	1,146.75	382.16
Rent	205.25	200.00	5.25	1,621.00	1,600.00	21.00
Social security taxes	5.20	3.60	1.60	185.70	85.18	100.52
Telephone and telegraph	1,664.83	363.86	1,300.97	13,403.10	3,328.88	10,074.22
Travel	503.94	1,023.49	519.55*	4,581.04	5,865.92	1,284.88*
Unclassified	8.65	—	8.65	223.75	655.33	431.58*
	5,597.69	2,800.35	2,797.34	41,218.95	28,420.66	12,798.29
Operating profit or loss*	4,233.43	1,736.43	2,497.00	31,795.91*	27,238.00	59,033.91*
Other Income						
Commissions earned	585.26	—	585.26	2,770.87	—	2,770.87
Sundry	—	447.11	447.11*	3,400.60	4,203.55	802.95*
	585.26	447.11	138.15	6,171.47	4,203.55	1,967.92
	4,818.69	2,183.54	2,635.15	25,624.44*	31,441.55	57,065.90*
Other Deductions						
Interest	—	—	—	798.96	—	798.96
Loss on investment	—	—	—	5,813.95	—	5,813.95
	—	—	—	6,612.91	—	6,612.91
Earnings or loss* (before partners' salaries)	4,818.69	2,183.54	2,635.15	32,237.35*	31,441.55	63,678.90*
Partners' Salaries	3,000.00	2,400.00	600.00	21,900.00	19,500.00	2,400.00
Net Earnings or Loss*	$ 1,818.69	$ 216.46*	$ 2,035.15	$ 54,137.35*	$ 11,941.55	$ 66,078.90*

Note

The income taxes on the net earnings for the period are payable personally by the partners and are not shown in this statement.

* Denotes red figures.

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Penguin Frozen Foods

STATEMENT OF PARTNERS' CAPITAL

Eight months ended August 31, 1954

(Presented subject to the accompanying letter dated September 15, 1954)

	Henry Appelbaum	Stewart M. Appelbaum	Robert D. Appelbaum	Stewart M. Trust	Robert D. Trust	Lawrence W. Trust	Lila Ann Trust	Dotty Trust	Henry Appelbaum as guardian of Lawrence W. Appelbaum	Henry Appelbaum as guardian of Lila Ann Appelbaum	Total
Partner's capital—January 1, 1954...	$109,700.69	$ 16,539.75	$ 10,037.26	$ 5,097.70	$ 5,097.70	$ 5,097.70	$ 5,097.70	$ 24,836.52	$ 14,297.65	$ 18,724.20	$214,526.87
Additional capital contributed.....	7,079.11	722.14	2,592.82	—	—	—	—	—	1,547.15	1,366.76	13,307.98
Partners' salaries	16,000.00	2,500.00	3,400.00	—	—	—	—	—	—	—	21,900.00
	132,779.80	19,761.89	16,030.08	5,097.70	5,097.70	5,097.70	5,097.70	24,836.52	15,844.80	20,090.96	249,734.85
Net loss for the eight months ended August 31, 1954.....	7,218.31	7,218.31	7,218.31	1,804.58	1,804.58	1,804.58	1,804.58	10,827.48	7,218.31	7,218.31	54,137.35
	125,561.49	12,543.58	8,811.77	3,293.12	3,293.12	3,293.12	3,293.12	14,009.04	8,626.49	12,872.65	195,597.50
Partners' drawings for eight months ended August 31, 1954.....	10,688.30	3,100.00	3,900.00	38.75	38.75	38.75	38.75	343.51	200.00	100.00	18,486.81
Partners' Capital— August 31, 1954.....	$114,873.19	$ 9,443.58	$ 4,911.77	$ 3,254.37	$ 3,254.37	$ 3,254.37	$ 3,254.37	$ 13,665.53	$ 8,426.49	$ 12,772.65	$177,110.69

280 DEFENDANT'S EXHIBIT NO. 7.

Crest Importing Company, Inc.
1521 Fourth Avenue—Suite 10
San Diego 1, California

March 2, 1954

Letter No. 57
Exportadores Asociados, S. A. de C. V.
San Juan de Letran No. 21-908-9
Mexico, D. F.

Attention: Mr. Guillermo Lepcowitz

Dear Bill:

At long last, I am attaching the proposed contract between Crest Importing Company, Inc. and Exportadores Asociados. Please understand that the contract attached is a draft only since you may have certain provisions which you wish to include. I am attaching this in duplicate, and after you have reviewed and advised me of the corrections that you deem necessary, we will then retype the contract and forward the final document for signing.

With reference to the preamble, please advise whether the contract should be executed in Mexico, D. F., and also, whether it should be protocolized.

I believe the contract contains all the pertinent points, and I have endeavored to embody in the contract a clear outline of the relationship between Crest and EASA. It is of utmost importance that we preclude any possibility or contention that EASA or its shippers are doing business in the United States.

Allow me to apologize again for the procrastination and delay in forwarding the attached.

With kindest regards.

Very truly yours,
Crest Importing Company, Inc.
J. W. Willis

JWW/fvd

281 Agreement for Sale of Shrimp

Between

Exportadores Asociados, S. A. de C. V. and
Crest Importing Company, Inc.

In the City of Mexico, Federal District, Mexico, on the ..... day of ....., 1953, Exportadores Asociados, S. A. de C. V., hereinafter called "Shipper", and Crest Importing Company, Inc., a California corporation, hereinafter called "Crest", entered into the following agreement:

1. Shipper is a Mexican corporation owned by the following firms: Refrigeradora del Noroeste, S. A., Congeladora del Pacifico, S. A., Hernando de Cima, Ernesto de Cima, and Pesquera de Los Mochis, S. de R. L. The above listed firms are owners of refrigeration plants and refrigerated warehouses and/or fishing vessels and/or engaged in fishing for and otherwise acquiring shrimp, preparing the same for sale in a frozen condition and desire to export their entire production of frozen shrimp, excepting the portion thereof required to be reserved under Mexican law for national consumption, through the firm, Exportadores Asociados, S. A. de C. V.

2. Crest is engaged in distributing in the United States of America and elsewhere frozen seafoods and other commodities and has facilities for making such distribution at market prices.

3. Shipper agrees to sell to Crest, and Crest agrees to buy from Shipper on the terms hereinafter stated, Shipper's entire production of frozen shrimp with the exception noted in paragraph (1) hereof, for a period beginning from the date of execution of this agreement and ending August 31, 1956.

4. Shipper guarantees that all shrimp sold under this agreement shall be of good and merchantable quality and shall conform to the requirements of the Food and Drug laws of the United States and the requirements of the food, drug and health laws of any jurisdiction in which the same may be resold by Crest. Shrimp not so conforming shall not be considered as sold or purchased under this agreement and any moneys advanced by Crest on account of any shipment of shrimp by Shipper purporting to be

made under this agreement but which does not so
282 conform shall, immediately on the determination of non-conformity, be due and owing from Shipper to Crest, and Crest may deduct the amount thereof from any moneys due or thereafter to become due from Crest to Shipper.

5. As shrimp deliverable under this agreement are ready for shipment, Shipper will forward to Customs Broker at Nogales, Arizona, original shipping document and all papers necessary for entry of the shipment into the United States. Shipper may then draw on Crest for ..... percent of the market price as of the date of shipment. Such market price shall be the price last advised by Crest to Shipper. Such drafts shall be accompanied by invoices indicating the number and size of the cartons making up the shipment, the count or grade of the shrimp, copy of the nota de remision, and copy of bill of lading. Crest agrees to honor such drafts covering shipments immediately upon presentation of such draft through its own bank, with the provision however, should any shipment not receive clearance from the United States Food and Drug Administration permitting the sale of such shipment that any moneys advanced shall be charged back to the Shipper under the provisions of paragraph (4). Crest agrees to keep Shipper informed of market conditions in the United States with reference to the wholesale price for shrimp.

6. Crest agrees to pay Shipper as the price for the shrimp a sum equal to (illegible) percent of the price at which Crest may sell it in the United States, less freight or transportation expenses and refrigeration expenses while in transit. Other expenses such as warehousing, warehouse insurance, sub-brokerage, and selling expenses shall be for Crest's account that allowances for incorrect count or poor quality or weight shall be for Shipper's account. Custom duties and charges are for account of the Shipper.

Crest shall use its best efforts to obtain the prevailing market price at place of sale of each shipment. Crest also assumes all credit risk on sales.

283 7. Crest and Shipper agree that all merchandise shall be packed under a label to be designated by Crest and which label or trademark shall be owned by Crest. Crest agrees to secure all containers required for shrimp

sold under such labels and Shipper agrees that the cost of such containers shall be paid by the Shipper.

8. Crest agrees to place and maintain insurance against all risk of physical loss or damage to shipments of shrimp hereunder, except loss of market due to delay, inherent vice, and loss or damage arising from war. Crest may in its discretion determine and declare the value of each shipment. In case of a recovery for any loss insured against, the amount of such recovery shall, for the purpose of paragraph (6), be deemed to be the gross resale price of the shrimp lost or damaged.

9. This agreement shall bind and inure to the benefit of the successors and assigns of the parties. Shipper agrees that it will require any purchaser of any of the plants and/or warehouse and/or fishing vessels belonging to the parties described in the first paragraph of this agreement to assume and agree to perform all of the Shipper's obligations hereunder.

10. All payments to be made under or referred to in this agreement shall be in funds of the United States of America.

11. Any controversy hereafter arising out of, under or concerning this agreement, or the refusal of either party to perform the whole or any part hereof, shall be settled by arbitration as provided in Part 3, Title X of the Code of Civil Procedure of the State of California.

12. The parties agree that the foregoing is a full, true and complete translation into the English language of the material provisions of an agreement in the Spanish language which was executed by the parties in the City of Mexico, Federal District, Mexico, on the ..... day of ....., 19....., and on that day registered with ....., a Notary Public of said

284 city, and that in the event of disagreement as to the meaning, effect, or interpretation of said agreement, the foregoing English translation shall control.

Executed in triplicate.

Exportadores Asociados, S. A. de C. V.

By .....

Crest Importing Company, Inc.

By .....

285 DEFENDANT'S EXHIBIT NO. 9.

(Letterhead of Wilbur-Ellis Company,
San Francisco 4, California.)

March 23, 1953

Sr. Isaac Coppel
Congeladora del Pacifico, S. A.
Apartado Postal No. 49
Mazatlan, Sinaloa, Mexico

My dear Isaac:

I promised to forward a separate letter to you personally as to the points that I would want included in any contract I might sign on the new venture we discussed.

You will know from a previous letter that I am very interested in this project and having discussed the proposition with Mr. Franck, am now in a position to indicate my interest and enthusiasm. However, I am sure you can appreciate that I do not want to leave Wilbur-Ellis Company and a good job and future, regardless of the salary, unless I think I am reasonably protected for say three years.

I told Sr. Martinez Ostos without committing myself, and with the proviso that I must first clear myself with San Francisco, that if a "package" deal were offered to me I would be very interested. The points discussed were:

1. That there be a minimum production of 6,000,000 pounds per year. I do not believe it possible to be a factor in the market without this. I also believe it very important that at least one Guaymas account be included.
2. That all production be packed under one label and that I have some semblance of control as to packing methods, etc.
3. I would want a contract for 3 years with my salary guaranteed by Nacional Financiera or the American Bank.
4. Funds would have to be provided for payment of dormant expenses prior to the earning of revenue by the American company.
5. That bank financing in the U.S. be arranged in the amounts discussed in Mexico City.

DEFENDANT'S EXHIBITS REFUSED ADMISSION IN EVIDENCE.

286 I also hope that if this is consummated, that some way can be devised to prevent any of the members from selling any portion of their production outside. If this is not accomplished at the beginning it will be much more difficult later.

Incidentally, Isaac, I would like to mention here that I believe the budget submitted can be reduced, but do not wish to be too optimistic at the start.

I received your very kind letter of March 19th and do appreciate your and Arturo's interest in my behalf. I have certainly given this matter considerable thought since our conversations and have every faith in the success of this venture and in my ability to put it over in the U.S. I will most certainly work for the benefit of the producers involved and to warrant your confidence in me.

I have to go to Washington, D.C., April 10th but will see if I cannot come to Mazatlan prior to that time.

With best wishes to all of you.

Very truly yours,
J. W. Willis

287 DEFENDANT'S EXHIBIT NO. 10.

(Filed Mar. 27, 1956. Roy H. Johnson, Clerk.)

May 5, 1953

Sr. Raul Martinez—Ostos
Nacional Financiera, S. A.
V. Carranza #25
Mexico D. F.

Dear Mr. Martinez:

You asked me to send the production figures of certain of the West Coast shrimp producers. These are set forth below for the current and last season. The following points should be kept in mind when considering these figures:

1. The 1952/53 production is only for the season to date and production of all plants should increase somewhat by July 31st. The 1951/52 production is for the complete season.

2. These figures reflect only shipments to our company and not any production that may have been sold outside.

Most of them sold considerable production this year to direct buyers in Salina Cruz. Additional figures from the producers would therefore have to be obtained from the producers to show their total production.

3. The plants and producers identified by an asterisk were during the 1951/52 season included in the Productos Congelados production.

4. During the 1950/51 season, all of the plants had a greatly increased production.

	1952/53 Pounds	1951/52 Pounds
Congeladora del Pacifico	1,081,250	2,251,350
Congeladora Union, S. A.	872,700	855,050
*Pesquera Teresita—Guaymas	165,650	—
*Productos Congelados—Guaymas	416,700	*1,742,400
Ernesto de Cima—Guaymas	245,150	—
Productos Marinos—Guaymas	258,640	802,300
Mariscos Congelados—Guaymas	465,750	1,539,700

I do not have accurate production figures on the other plants such as Hector Ferreira or Pedro L. Pinson.

288 I have not included Armadores del Pacifico since their contract has one more year.

I would appreciate your asking Lic. Enreque Asunsolo writing to me and detailing just what information he would like for the American attorney to furnish him.

I believe it will be possible to make a success of this project with production somewhat less than 6,000,000 pounds, but do believe it very important to have as a participant, at least one other strong producer other than Senors Coppel, A. de Cima, and Pinson. I believe success would be assured if Congeladora Union would join and one Guaymas producer.

I sincerely hope that the meeting in Mexico City will be successful and will hasten the completion of this project. If I can be of further service, please let me know.

Sincerely,

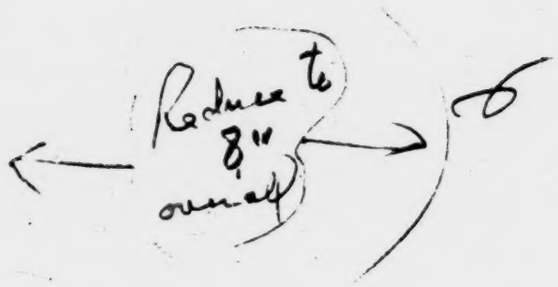
J. W. Willis.

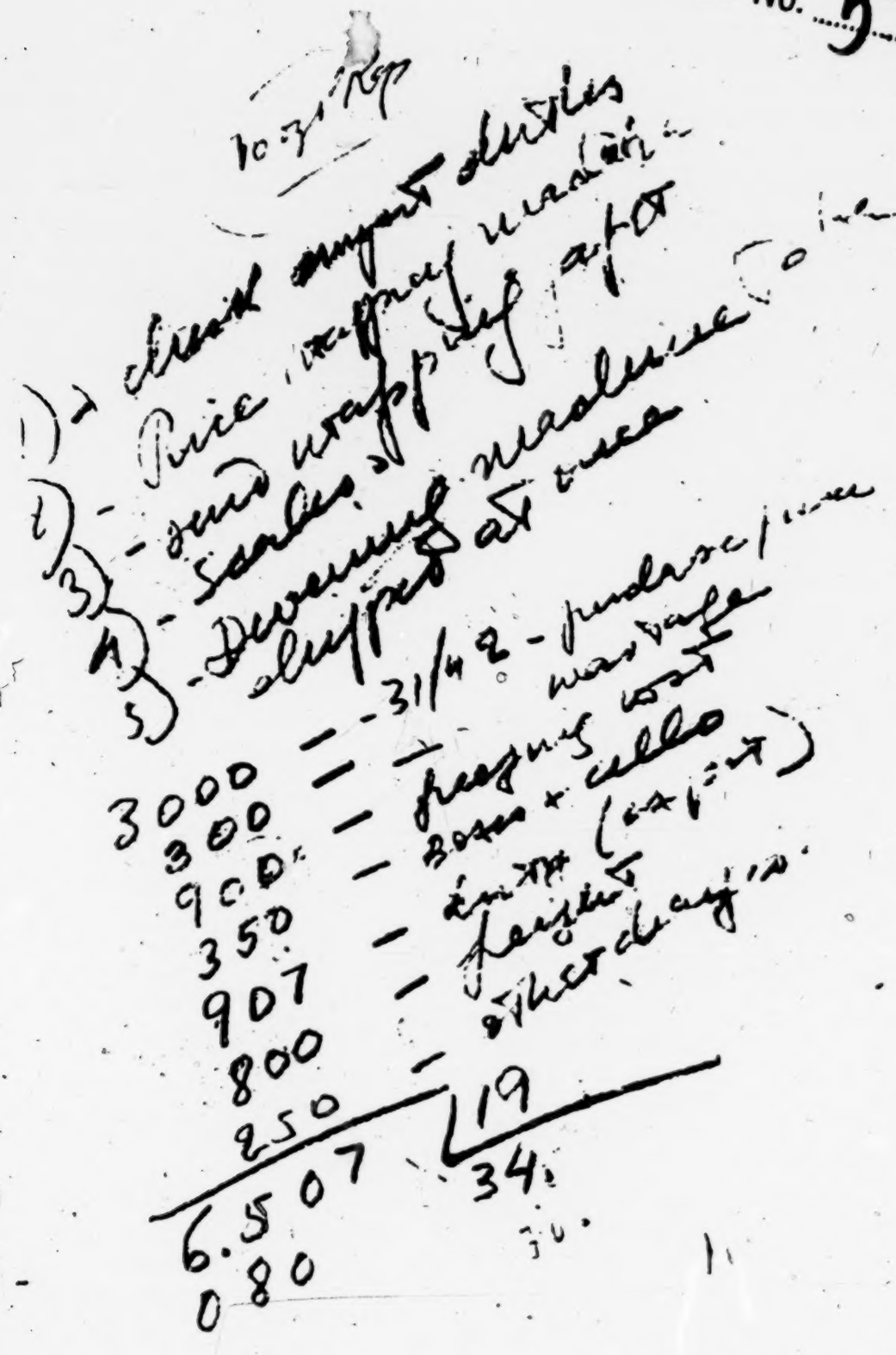
FILED

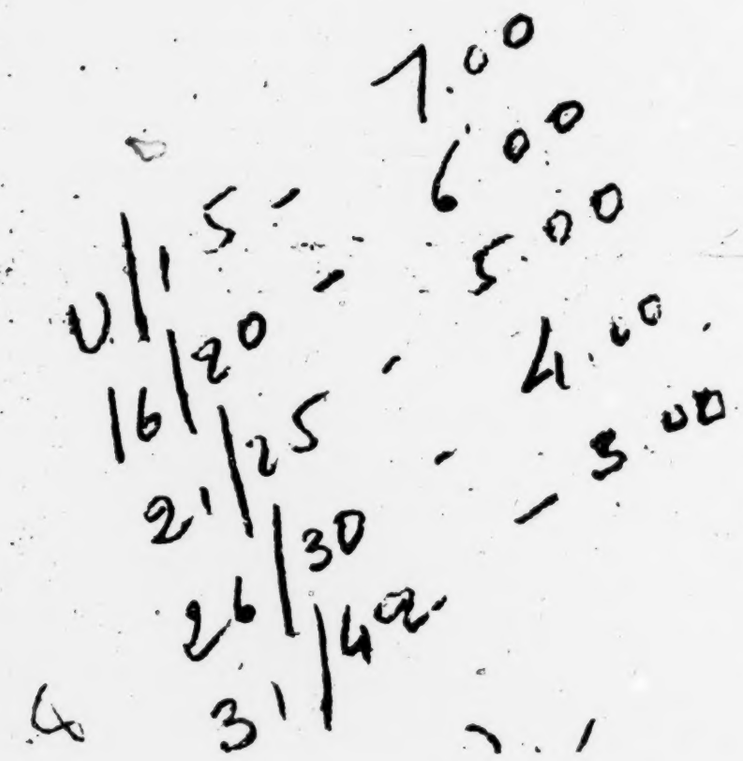
MAR 27 1956

AT ____ O'CLOCK
ROY H. JOHNSON
CLERK

Defendant's Ex. No. 57 ID.







289 DEFENDANT'S EXHIBIT NO. 14.

(Filed Mar. 27, 1956. Roy H. Johnson, Clerk.)

Crest Importing Company, Inc.
1521 Fourth Avenue—Suite 10
San Diego 1, California

October 22, 1954

Letter No. 18
Exportadores Asociados, S. A. de C. V.
San Juan de Letran No. 21-908-9
Mexico, D. F.

Attention: Mr. Guillermo Lepcowitz

Gentlemen:

In reply to your letter of October 18, we are attaching hereto the original copy of the contract between Exportadores Asociados and Crest Importing Company so you can make the necessary changes that you mentioned in your letter and also insert the proper dates.

We should appreciate your returning this contract as soon as possible.

Very truly yours,

Crest Importing Company, Inc.
F. V. Digaloff.

fvd

290 DEFENDANT'S EXHIBIT NO. 15.

(Filed Mar. 27, 1956. Roy H. Johnson, Clerk.)

Exportadores Asociados, S. A. de C. V.
San Juan de Letran No. 21, Desp. 908-909—Tel. 18-43-46
Mexico 1, D. F.

October 18, 1954.

Mr. J. W. Willis,
Crest Importing Co.,
1521 Fourth Ave. Suite 10
San Diego 1, Calif.

Dear Jack:

In reference to your favour No. 9 (Sept. 24th.) please airmail me at once the original, and whatever other copies you might have, of the contract, as there are some minor changes that must be made.

As soon as I get these, I will return them to you with the proper dates.

Thanking you, I remain,

Sincerely yours,
Exportadores Asociados, S. A. de C. V.
Guillermo Lepcowitz,
Gerente.

291 DEFENDANT'S EXHIBIT NO. 16.

(Filed Mar. 27, 1956. Roy H. Johnson, Clerk.)

Crest Importing Company, Inc.
1521 Fourth Avenue—Suite 10
San Diego 1, California

September 24, 1954
(Dict. 9/23/54)

Letter No. 9
Exportadores Asociados, S. A. de C. V.
San Juan de Letran No. 21-908-9
Mexico, D. F.

Attention: Mr. Guillermo Lepcowitz

Dear Bill:

We are returning herewith the contract which you forwarded with your letter, 64-M-873.

We are enclosing the duplicate and would appreciate your advising us what dates should be inserted on the first page and last page of the contract. Please let us have this information as soon as possible.

Kindest regards.

Very truly yours,
Crest Importing Company, Inc.
J. W. Willis.

JWW/fvd

292 DEFENDANT'S EXHIBIT NO. 17.

(Filed Mar. 27, 1956. Roy H. Johnson, Clerk.)

Exportadores Asociados, S. A. de C. V.
San Juan de Letran No. 21, Desp. 908-909—Tel. 18-43-46
Mexico 1, D. F.

CF-64-M-873.

September 21, 1954.

Crest Importing Co., Inc.,
1521 Fourth Avenue, Suite 10,
San Diego, Cal.,
E. U. A.

Attention: Mr. J. W. Willis.

Dear Jack:

According to your letter No. 2 of September 7, we are attaching hereto two sets of the Contract between Exportadores Asociados, S. A. de C. V., and Crest Importing Co., Inc., signed in representation of EASA by Mr. Isaac Coppel.

We will appreciate very much your sending us, by return mail if possible, one of these sets previously signed by Crest Importing Co., Inc.

With kindest regards, we remain,

Very truly yours,
Exportadores Asociados, S. A. de C. V.
Guillermo Lepcowitz,
Manager.

Enclosure:
mga.

293 DEFENDANT'S EXHIBIT NO. 18.

(Filed Mar. 27, 1956. Roy H. Johnson, Clerk.)

Exportadores Asociados, S. D. de C. V.
San Juan de Letran No. 21, Desp. 908-909—Tel. 18-43-46
Mexico 1, D. F.

CF-20-M-361

February 17, 1954.

Crest Importing Co., Inc.,
1521 Fourth Avenue, Suite 10,
San Diego, Cal.,
E. U. A.

Attention: Mr. J. W. Willis.

Gentlemen:

We refer to our letter of February 3, as well as the corresponding Debit Memoranda, which we mailed to you under separate cover for signature.

We hope that said documents reached you, and that same are already on their way back.

Another point which is also very important in connection with our fiscal requirements is the contract between Crest Importing Co. Inc., and Exportadores Asociados, S. A. Since your letter No. 32 of December 1st., 1953, we have no news on this regard. Considering the urgency of this contract, in order to avoid trouble with our fiscal authorities, we take the liberty to suggest you that if your attorney has not worked on that contract as yet, it will be necessary to see somebody else for that purpose.

We hope that you will understand how badly we need the documents mentioned above, and will appreciate your cooperation on this matter.

With kindest regards we remain,

Very truly yours,
Exportadores Asociados, S. A. de C. V.
Guillermo Lepcowitz,
Manager.

GL/mtrc

294 DEFENDANT'S EXHIBIT NO. 41.

(Filed Mar. 27, 1956. Roy H. Johnson, Clerk.)

Lakeside Fish & Oyster Co. Inc
Wholesale Dealers
657 Fulton Street, Chicago 6, Illinois
CE 6-0380-7

October 12, 1953.

Penguin Frozen Foods,
120 South LaSalle Street,
Chicago 3, Illinois.

Attn: Mr. Appelbaum

Gentlemen:

On October 7th, 1953, we purchased 2500# of 21/25 count Nore Brand Shrimp, and I related to you on the phone, each and everyone of our customers is complaining bitterly regarding the quality and weight.

These Shrimp are filthy, full of dirt, and improperly packed, and have a slight odor. Most of our trade have returned these Shrimp to us, some defrosted, and some frozen intact, as they cannot use same. We have had further complaints that the Shrimp weighed out from 4½# to 4¾#, whereas we are invoicing them for 5 lbs. We certainly cannot build up our business handling Shrimp of this quality, and we are rather surprised that a company, such as yours, permits Shrimp of this kind to be sold to customers, such as ourselves.

We have lost considerable business due to these Shrimp, and it has certainly caused us undue aggravation and expense in delivering same, picking same up, and rehandling. We feel that you should give us some consideration, for these Shrimp were practically a loss to us. In fact, some of our trade were so disgusted, and disappointed with these Shrimp, that they even had ideas calling in the Pure Food and Drug. However, we overcame this, for we certainly did not want you, or ourselves in trouble.

We will leave the matter entirely in your hands, and await your reply.

Very truly yours,
Lakeside Fish & Oyster Company
By: /s/ R. B. Sacks
Rudolph B. Sacks,
President.

RBS:nr

295 DEFENDANT'S EXHIBIT NO. 42.

(Filed Mar. 27, 1956. Roy H. Johnson, Clerk.)

September 11, 1953

To: Mr. J. Cherny, Chicago

From: F. Clatworthy

On Saturday, August 31st, a shipment of shrimp was delivered to Detroit Harbor Terminal from Penguin Sales of Chicago. This was checked by Detroit Unit Inspectors and found to be short weight. Mr. Mulligan from this office proceeded immediately to the Harbor Terminal to check this and found this shortage to be consistent and variable, many five pound units when taken from the cartons being as much as four ounces underweight.

We phoned you immediately asking for disposition, and received your phone call later to the effect that being Saturday you could not contact anyone with authority at Penguin.

The Detroit Unit received these as net weight 4¾ lbs. per carton and a shipment was sent to the lab at Boston for checking. It became necessary to send a second shipment as the first arrived slackened. The Lab at Boston reported this second shipment, which arrived in top shape, was short a total of 6½ ounces on four cartons.

This shortage was nowhere near as heavy as that noted by the Detroit inspectors, but Detroit agreed at our request to abide by Boston lab report and therefore the quantity of 20,000 pounds on the invoice was reduced by 2% or 400 pounds and the invoice passed for payment. We are enclosing a copy of this letter for Penguin as per your request.

Yours truly,

F. Clatworthy.

FC:lp

cc: Penguin Sales Co.
Mr. R. C. Curll, Boston

296 DEFENDANT'S EXHIBIT NO. 43.

(Filed Mar. 27, 1956. Roy H. Johnson, Clerk.)

Lakeside Fish & Oyster Co. Inc
Wholesale Dealers
657 Fulton Street, Chicago 6, Illinois
CE 6-0380-7

October 26, 1953.

Penguin Frozen Foods,
120 South LaSalle Street,
Chicago 3, Illinois.

Attn: Mr. Applebaum

Dear Mr. Applebaum:

On our purchase of October 23, 1953 of 3390# of 21/25 count Nore Shrimp, we find that these Shrimp are identical to the Shrimp that we purchased on October 7th.

I am quite mindful of the fact that you gave us every assurance that this lot would not be like the original lot, for you felt that your packer possibly, accidently, let a few Shrimp be packed which were not given the necessary care that he usually provides. We have sent these Shrimp out to our trade on Friday, Saturday, and today, and as I stated above, we are having a repetition of complaints, loss of business, and all kinds of threats against our company for selling merchandise of this kind.

I am really at a loss to tell you what you should do, but I feel that should you want us as a customer, that we should be reimbursed quite substantially for these two lots of Shrimp.

Very truly yours,
Lakeside Fish & Oyster Company
By: R. B. Sacks
Rudolph B. Sacks,
President.

RBS:nr

297 DEFENDANT'S EXHIBIT NO. 44.

(Filed Mar. 27, 1956. Roy H. Johnson, Clerk.)

Fisher's
Wholesale Commission Dealers
116 Fulton Fish Market
New York City

November 20, 1953

Penguin Frozen Foods
120 South LaSalle St
Chicago, Illinois

Gentlemen,

May we remind you that we signed a mutual contract with you three years ago to handle Reno Brand Shrimp exclusively in the New York Market for four years. When we undertook to handle your product originally, we spent a lot of time, money and labor trying to sell what at the time was the poorest brand of shrimp ever to hit the New York market.

After a long struggle we feel that we built a good following and fine reputation for the Reno Brand Shrimp in New York.

It is our opinion that you are diverting this shrimp under another label to our competitors. We form this opinion from the fact that we bought a carton of shrimp labeled Crest Brand and our experience gained by the volume of Reno Shrimp we have handled tells us that this is Reno Shrimp disguised only by a new container.

Can you tell us where the justice is in this matter.

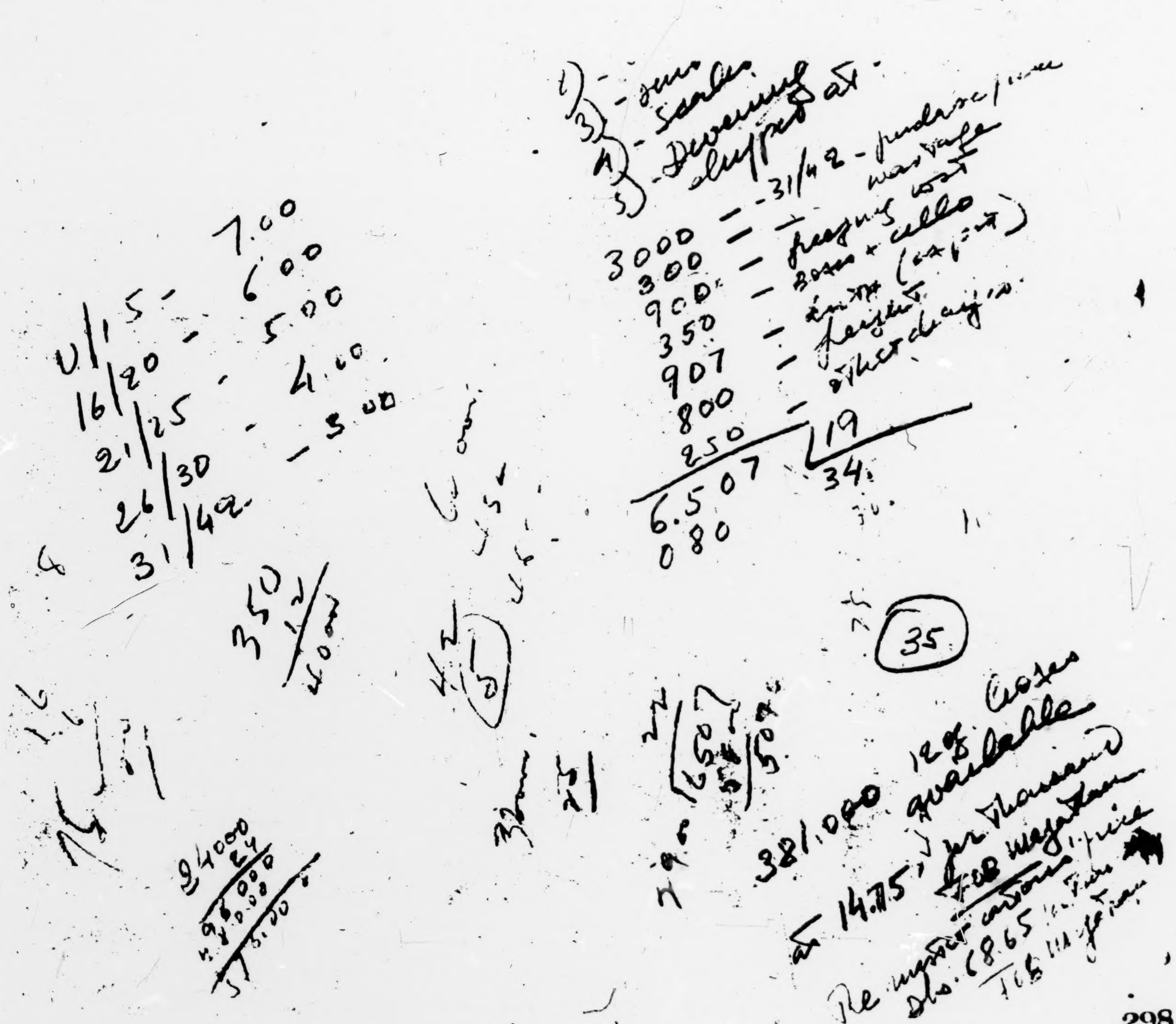
We also take note of the fact that you promised us restitution about two months ago on two shipments of very poor Reno peeled Shrimp. As yet we have not received same.

Can you clear these questions for us in as much as we owe our customers an explanation too.

Thanking you for past favors:

We remain,

/s/ Samuel Goldman
Fisher Fish Co Inc



299 DEFENDANT'S EXHIBIT NO. 52.

(Filed Mar. 27, 1956. Roy H. Johnson, Clerk.)

William B. Rose & Associates
4752 Touhy Avenue
Lincolnwood 30, Illinois.
ORchard 3-3505.

Jan. 31, 1953.

Customer's Order No. & Date
Mr. Applebaum
1/29/53

Requisition No.
Sold to

Penguin Foods,
120 S. LaSalle St.,
Chicago 3, Ill.

Shipped to and Destination
Sr. Pedro Pinson,
Refrigeradora del Noroeste, S.A.,
Vincente Guerrero—108 Oriente,
Mazatlan Sin Mexico.

Date Shipped
1/30/53

Car Initials and No.
How Shipped and Route
From
Prepaid or Collect?
F.O.B.

Terms
10 days.

Quantity	Description	Price Unit	Amount
1	Prawnto Shrimp Cutter and Deveiner Subject to 15% discount in volume purchase. Paid 5/18/53.		$149.00

303 DEFENDANT'S EXHIBIT NO. 53.

Bonding Company.

Lotonal, S. A.

The Lotonal, S. A. Bonding Company in use of the authorization granted by the Secretary of the Treasury & Public Credit, constitutes itself Bonding Company up to the sum of $14,***.00 before the border customhouse of Nogales, Sonora, Mexico, to guaranty the import and additional taxes corresponding to the merchandise of 100 Drums being imported temporarily into the country for Refrigeradora del Noroeste, S. A., V. Guerrero #108, Mazatlan, Sinaloa under the protection of Temporary Import Petition #31, Reg. No. 586, dated January 24, 1953, subscribed by Custom House Broker, Rodolfo Joffroy, M.

They are 9700 net kilos (20,000 Lbs.) flour made in U. S. A. which will be employed to bread frozen shrimp destined for exportation, being imported temporarily into the country under the support of articles #321 and 350 of the custom house code of laws in conformity with telegram #301-1-2953 remitted by the General Direction of Custom Houses dated January 16, 1953.

In the understanding that the present guaranty will be in force all the time that elapses, until the insured operation stands legally closed without debt to the National Treasurer and that this company renounces the benefit of * * * if the obligation has not been covered or extinguished.

Jose Contreras Iglesias.

304 DEFENDANT'S EXHIBIT NO. 54.

(Filed Mar. 27, 1956. Roy H. Johnson, Clerk.)

Petition for Temporary Import.

Addressee: Refrigeradora del Noroeste, S. A.
Vicente Guerrero #108
Mazatlan, Sinaloa

Commercial invoice number 23390 dispatched by Meletio Seafood Company of St. Louis, Mo., dated November 19, 1952, documented #641 by the Mexican counsulate in St. Louis, Mo. dated December 10, 1952.

Refrigeradora del Noroeste S/N

100 Drums Flour.....$3,238.00

100 Drums — Total.....

They Are Nine Thousand Seventy-Two Kilograms Net (20,000#) Flour Made in U. S. A., Which Will Be Employed to Bread Frozen Shrimp Destined for Exportation, Which Are Imported Into Mexico Temporarily Under Support of Articles 321 and 350 of the Custom House Code of Laws and in Agreement With Telegram #301-1-2953 Remited by the General Direction of Custom Houses Dated January 6, 1953.

I Protest That the Name and Address of the Addressee Are Correct and the Importation Made by Another's Account, Being Current With Payment of Tax on the Rent. Nogales, Sonora, January 24, 1953 by Rodolfo Joffroy M., Custom House Broker.

Gilberto Noriega M.

• • • • •

306 DEFENDANT'S EXHIBIT NO. 55.

(Filed Mar. 27, 1956. Roy H. Johnson, Clerk.)

(Letterhead of Agencia Joffroy, Nogales.)

Penguin Frozen Foods, Inc.
120 So. La Salle Street,
Chicago, Ill.

Gentlemen:—

In accordance with your instructions we are sending to you herewith our expense bills Nos. 57270 and 68142 covering the clearance of the cartons and paper which we reforwarded to Refrigeradora del Noroeste, S. A.

Yours very truly,

Agencie Joffroy.

aa

(Stamp) Paid 1774 3-5-53. Per.....

(639)

FILED

MAR 27 1953

CLOCK

ROY H. JOHNSON

MODELO NÚM. 26
(REVERSO)

RESULTADO DEL RECONOCIMIENTO ADUANERO

AJUSTE DE LOS IMPUESTOS

BULTOS						CLASIFICACION ARANCELARIA	Fracción	CUOTAS		Precio Oficial por unidad	Valor en DOLARES	Reducción de CANT para el ajuste	Precio Oficial total	Valor Comercial total mon. nac.	IMPUESTOS ADUANEROS		Otros Impuestos Derechos y Multas
Marcas	Núms.	Cant.	Clase	Peso Bruto c/u	Peso Legal c/u			Específicos	Advalorem						Específicos	Advalorem	
REPRESENTADO-RA DEL NORTE		26	CARTONES	16 500	Ks. 15 Gs.	Ks. CAJAS DE CARTON.-	7.56.22-1	E.L.$4.00	50%	$ 8.00	$ 233.41	390	$ 0.120.00	$ 2,039.28			
R9T6.-																	
																Impo. Gral. Impo.	$ 1560.00
																Advalorem	1560.00
																Sobre adicional	93.60
																sobre adicional	31.20
																Total	$ 3,244.80

DESPACHADO

FEB 18 1953

EL VISTA

INSPECTOR ADUANERO

Roca 18 de Marzo a 14 de Febrero de 1953.
Agregado con [illegible] números 285/53

[illegible]

Defendant's EX. No. 56

ESTE DOCUMENTO NO SERA VALIDO
PARA EFECTOS DE INTERNACION.

207

"IMPORTACION - - - TEMPORAL"

C. JEFE DE LA ADUANA DE NOGALES, SONORA.

RODOLFO JOFFROY M. AGENTE ADUANAL solicita el reconocimiento aduanero de las siguientes mercancías llegadas por CARROS COMUNES - - -

FILED

MAR 27 1956

AT O'CLOCK

ROY H. JOHNSON

CLERK

PATENTE No. 661
REGISTRO LOCAL No. 25

AGENCIA JOFFROY

RODOLFO JOFFROY M.
AGENTE ADUANAL

P. O. Box No. 800 NOG., ARIZ.
APDO. POST. 48 NOG., SON.
TELS. 347 y 369

Refrigeradora del Noroeste,S.A.,
Mazatlán,Sinaloa.-

314- 68142.-

Fecha de Despacho 2/18/53
Date of Shipment

Solicitud No.—

Ped. 58 Reg. No. 1140

Boleta No.

Cta. Penguin Frozen Foods,
120 So. La Salle St.,
Chicago, Ill.-

Muy Sr. (es) mio(s) y Amigo(s)

He despachado en esta Aduana 26 cartones cajas de carton,
We have reforwarded

Recibidos de Hamilton Foods Inc. -- Chicago, Ill.-
Received from

y embarcado por Expruss a la consignación de Refrigeradora del Noroeste, S. A.,
and shipped by to

Mazatlán, Sinaloa.-

He cargado en su apreciable cuenta:
have charged your good account

$ 28.84 MONEDA AMERICANA U. S. Cy.

$ -.- MONEDA MEXICANA Mexican Money

importe de mi Nota de gastos según especificación al calce, que suplico atentamente situarme en esta ciudad, LIBRE DE TODO GASTO y en la misma especie de moneda especificada
to cover expenses and our commission as specified below
Kindly favor us with your remittance to cover at your earliest convenience

Su afmo., atto., amigo y S. S.
Yours Very Truly
RODOLFO JOFFROY M.

FURGON No.

FACT. No. A 3649

Guía de Express Núm. 83671

2/19

Peso 413 kls.

número y fecha de ...DR MULTAS QUE ...rada esta remesa al	ESPECIFICACION		MONEDA AMERICANA	MONEDA MEXICANA
	1	Flete al Freight to — en Nogales, riz., Cta. adjunta		
	2	Flete al Mexican Freight No. — en Nogales, Son., Cta. adjunta		
	3	Despacho Americano s/g Cta. No. American C. H. Brokers Fee Etc. 12% S/ Aforo de $		

Defendant's Ex. No. 58

FILED

MAR 27 1956

AT O'CLOCK

ROY H. JOHNSON CLERK

PATENTE No. 660
REGISTRO LOCAL No. 25

AGENCIA JOFFROY

RODOLFO JOFFROY M.
AGENTE ADUANAL

P. O. Box No. 800 NOG., ARIZ.
APDO. POST. 48 NOG., SON.
TELS. 347 y 369

57270 57270 B.-

Fecha de Despacho 2/19/53.-
Date of Shipment

Solicitud No. _____

Ped. _____ Reg. No. _____

Boleta No. _____

Refrigeradora del Noroeste, S. A.,
Mazatlán, Sinaloa.-

Cta, Penguin Frozen Foods, Inc.
120 So. La Salle St.,
Chicago, Illinois.-

Muy Sr. (es) mio(s) y Amigo(s)

He despachado en esta Aduana 8 cartones con papel.-
We have reforwarded

Recibidos de Uds.,
Received from

y embarcado por Express a la consignación de Refrigeradora del Noroeste, S. A.,
and shipped by to Mazatlán, Sinaloa.-

He cargado en su apreciable cuenta:
have charged your good account

$ 310.05 MONEDA AMERICANA U. S. Cy.
$ -.- MONEDA MEXICANA Mexican Money

importe de mi Nota de gastos según especificación al calce, que suplico atentamente situarme en esta ciudad, LIBRE DE TODO GASTO y en la misma especie de moneda especificada
to cover expenses and our commission as specified below
Kindly favor us with your remittance to cover at your earliest convenience

Su afmo., atto., amigo y S. S.
Yours Very Truly
RODOLFO JOFFROY M.

FURGON No.

FACT. No. (S/Facts.,) Núm. A-3649.-
Guía de Express número 83692.-

Peso 213 Kls.,

número y fecha de OR MULTAS QUE pada esta remesa al	ESPECIFICACION	MONEDA AMERICANA	MONEDA MEXICANA
	1 Flete al Freight to en Nogales, Ariz., Cta. adjunta		
	2 Flete al Mexican Freight No. en Nogales, Son., Cta. adjunta		
	3 Despacho Americano a/g Cta. No. American C. H. Brokers Fee Etc.		
	12% S/ Aforo de $		

Defendant's Ex. No. 59

FILED 643

MAR 27 1956

AT O'CLOCK

ROY H. JOHNSON CLERK

MODELO NUM. 66

(REVERSO)

RESULTADO DEL RECONOCIMIENTO ADUANERO

AJUSTE DE LOS IMPUESTOS

BULTOS						CLASIFICACION ARANCELARIA	Fracción	CUOTAS		Precio Oficial por unidad	Valor en DOLARES.	Reducción de CANT para el ajuste	Precio Oficial total	Valor Comercial total mon. nac.	IMPUESTOS ADUANEROS		Otros Impuestos Derechos y Multas
Marcas	Núms.	Cant.	Clase	Peso Bruto c/u	Peso Legal c/u			Específica	Advalorem						Específicos	Advalorem	
REFRIGERADORA 3/N. DEL NOROESTE.		100	TAMBORES	97 K. 90 0.500 G.720		K. HARINA.- - - - - - - - G. - - - - - - - - - -	2.14.01-1	K.L. $0.20	40%	K.L. $2.25	$3,238.30	9022	$20,412.00	$28,008.70		1814.40 1103.40 390.24 1301.72	

DESPACHADO

ANGEL CORTES

Reg. Gral. Rentas $ 1814.40
Contribución 1103.40
Timbre Estatal 390.24
Impuesto Adicional 1301.72

Total $ 14,710.31

Pagado

Sólo Derecho a Inspección

Recibo Oficial #825007 de 1/24/56

Teniente de Salida

El Juez de Turno

José E. Vivas Sánchez

ESTE DOCUMENTO NO SERA VALIDO PARA EFECTOS DE INTERNACION

Defendant's Ex. No. 60

311

MAR 27 1956

AT O'CLOCK

ROY H. JOHNSON

C. JEFE DE LA ADUANA DE NOGALES, SONORA.-

RODOLFO JOFFROY M., Agente Aduanal, - solicita el reconocimiento aduanero de las siguientes mercancías llegadas por Carros Comunes, - - - - - - - - - - - - - - - - - -

en fecha de 23 de Enero - - - - - - - - - - de 1953

Los impuestos AFIANZADOS, pagándose en efectivo únicamente el Impuesto de Inspección.

(Expresese la forma de pago o garantía)

DOCUMENTOS ANEXOS

Facturas Comerciales. (Juegos): Un.-

Conocimiento de embarque:

Otros documentos: Solicitud de despacho a bordo.-

"IMPORTACION-TEMPORAL"

MODELO NUM. 66

PEDIMENTO DE IMPORTACION TEMPORAL

(ANVERSO)

IMPORTACION TEMPORAL

ADUANA FRONTERIZA ENE 24 1953 NOGALES, SON.

Destinatario: REFRIGERADORA DEL NOROESTE, S.A.,

Dirección: V. GUERRERO # 108,

Ciudad: MAZATLAN, SINALOA.

País de Origen: ESTADOS UNIDOS DE NORTE AMERICA.

País Vendedor: ESTADOS UNIDOS DE NORTE AMERICA.

Tipo de Cambio Oficial: $8.65 x 1 Dlr.-

---EN CAMIONES PLACAS NUMS.:- S-8-974 Y 20-705.---

QUINTUPLICADO

PARA EL DESTINATARIO

Pedimento Núm. 31

Reg. Entrada Núm. 186

Reg. Ingresos Núm.

Confrontado por mí, contiene

Forma de pago FIANZA

(El Sub-Jefe)

Practíquese el reconocimiento por el C. Vista.

(El Jefe de la Aduana)

BULTOS				Designación Comercial de las Mercancías	Valor de las mercancías sin flete ni seguro DOLARES.	Importe de flete y seguro a puerto mexicano	OBSERVACIONES de la Subjefatura
Marcas	Números	Cant.	Clase				
FACTURA COMERCIAL #23390 EXPEDIDA POR MELTIO SEA FOOD CO. DE SAINT LOUIS, MO. CON FECHA 19 DE NOVIEMBRE DE 1952, VI-							Causa inspección
SADA CON EL NUMERO 641 POR EL CONSULADO DE MEXICO EN ST. LOUIS, MO. CON FECHA 10 DE DICIEMBRE DE 1952.- - - - - -							
REFRIGERADORA	S/N.	100	TAMBORES	HARINA.- - - - - - - - - - - - - - - - - - - -	$ 3,238.00		Se Vista según el Pedimento de la Aduana de Subsidad y existencia
DEL NOROESTE.		100-	CIEN BULTOS TOTAL. - - - - - - - - - - - - - - - - - -				
		SON NUEVE MIL SETENTIDOS KILOS NETOS (20,000 LIBRAS) DE HARINA DE MA-					
		NUFACTURA NORTEAMERICANA QUE SE EMPLEARA PARA EMPANIZAR CAMARON CONGE-					
		LADO DESTINADO A EXPORTACION, QUE SE IMPORTAN TEMPORALMENTE AL PAIS -					
		AL AMPARO DE LOS ARTICULOS 321 Y 350 DEL CODIGO ADUANERO Y DE CONFOR-					
		MIDAD CON EL TELEGRAMA NUMERO 301-I-2953 GIRADO POR LA DIRECCION GE-					
		NERAL DE ADUANAS CON FECHA 16 DE ENERO DE 1953.- - - - - - - - - -					
		PROTESTO QUE EL NOMBRE Y DIRECCION DEL-					
		DESTINATARIO SON LOS VERDADEROS Y LA -					
		IMPORTACION SE HACE POR CUENTA AJENA, -					
		ESTANDO AL CORRIENTE CON EL PAGO DEL -					
		IMPUESTO SOBRE LA RENTA.- - - - - - - -					
		NOGALES, SONORA, ENERO 24 DE 1953.-----					
		POR EL AGENTE ADUANAL RODOLFO JOFFROY M.					
		GIL[illegible]ORTEGA M.-					

Ped. No. 31 Ref. No. 186

1 24 53

Valor en Dlrs. 3,238.00

Flete " " -.-

FIANZA Por $ 14,710.00

INSPECCION - $ 3.63

3% Com. S/. Dls. Aduanagas Dlls. 29.67

% Rehaguardas $ 5.40

Defendant's Ex. No. 64

Guia de Express Num. 0307-2

Peso 413 kls. 2/29

NOTAS:-Para informes o reclamaciones sobre esta remesa, citese siempre el número y fecha de esta nota. NO SE CONSIDERA RESPONSABLE ESTA AGENCIA POR MULTAS QUE RESULTEN POR ERRORES NO ORIGINADOS POR ELLA. Entregada esta remesa al express o a los ferrocarriles, cesa nuestra responsabilidad.

	ESPECIFICACION	MONEDA AMERICANA	MONEDA MEXICANA
1	Flete al / Freight to — en Nogales, riz., Cta. adjunta		
2	Flete al / Mexican Freight No. — en Nogales, Son., Cta. adjunta		
3	Despacho Americano s/g Cta. No. / American C. H. Brokers Fee Etc.		
4	12% S/ Aforo de $ / Mexican Export Tax		
5	Manifiesto Consular / Mexican Consular Manifest) Visa Consular	-.58	
6	Shippers Export		
7	Val Merce. Dols. / Value of Merchandise $ 447.49	-.-	
8	Timbres, Documentos y Menores / Documentary Stamps	-.50	
9	Revisión y carga en Nogales, Ariz. / Inspection of Merchandise at Nogales, Ariz.	2.50	
10	Acarreos / Drayage (2)	3.00	15.00
11	Despacho y carga en Nogales, Son. / Labor of Customs Inspection at Nogales, Son.		15.00
12	Derechos pagados en la Aduana Mexicana / Duties Mexican Custom House Afianzados		-.-
13	Alambrar y Sellar / Bracing & Marking — Bultos / Pkgs.		
14	Conversión $ — $ 191.55 a Dlls. 0.1162	22.26	
15	Fianza / Bond S/$ 3,525.60 a 1% más 5% s/vr.prima		37.02
16	1 telegrama		4.20
17			
18	N/s Honorarios s/g Tarifa Oficial / Our Commission 1.60% S/$ 7,520.33		120.33
	INCLUSOS:- / Enclose:-		
	( ) Conocimiento Original	S. E. u O.	
	( ) Original B/L.		
	( ) Copia Liqda. Aduanal		
		28.84	##########

Defendant's Ex. No. 58

NOGALES, SON., 20 de Febrero de 1953.-

NOTA DE GASTOS No: 68142.-
Expense Bill No.

309

641

Guía de Express Aereo Expo.-

Peso 213 Kls.,

	ESPECIFICACION	MONEDA AMERICANA	MONEDA MEXICANA
1	Flete al / Freight to ~~Nogales~~ en Nogales, riz., Cta. adjunta		
2	Flete al / Mexican Freight No. en Nogales, Son., Cta. adjunta		
3	Despacho Americano a/g Cta. No. / American C. H. Brokers Fee Etc.		
4	12% S/ Afero de $ / Mexican Export Tax		
5	Manifiesto Consular / Mexican Consular Manifest)		
6	Shippers Export		
7	Val Merca. Dols. / Value of Merchandise $ 138.01	-.-	
8	Timbres, Documentos y Menores / Documentary Stamps	-.50	
9	Revisión y carga en Nogales, Ariz. / Inspection of Merchandise at Nogales, Ariz.	1.50	
10	Acarreos / Drayage (2)	2.75	12.50
11	Despacho y carga en Nogales, Son. / Labor of Customs Inspection at Nogales, Son.		10.00
12	Derechos pagados en la Aduana Mexicana / Duties Mexican Custom House		2,832.98
13	Alambrar y Sellar / Bracing & Marking Bultos Pkgs.		
14	Conversión $ $ 2,627.37 a $ 11s. 0.1162.-	305.30.	
15	Fianza / Bond		
16	1 telegrama		3.60
17			
18	N/o Honorarios s/g Tarifa Oficial / Our Commission 1.80% S/$ 3,793.95		68.29
	INCLUSOS.- / Enclosed.-		
	( ) Conocimiento Original / ( ) Original B/L / ( ) Copia Liqda. Aduanal S. E. u O.		
		310.05	##########

NOTAS.-Para informes o reclamaciones sobre esta remesa, dirse siempre al número y fecha de esta nota. NO SE CONSIDERA RESPONSABLE ESTA AGENCIA POR MULTAS QUE RESULTEN POR ERRORES NO ORIGINADOS POR ELLA. Entregada esta remesa al expreso o a los ferrocarriles, cesa nuestra responsabilidad.

Defendant's Ex. No. 59

NOGALES, SON., 24 de Febrero de 1953.-

NOTA DE GASTOS No: 57270 B.-
Expense Bill No.

310

6-19

FILED

53621

MAR 27 1956

AT ..... O'CLOCK .....

ROY H. JOHNSON

CLERK

FILED

12 50-100M

S-8248

DEMURRAGE OR STORAGE BILL

Moyles Way STATION Ore 12 19 52 D. S. No. 4746

M Admin Dept Roy Sa

TO **Southern Pacific Company,** DR., FOR DEMURRAGE OR STORAGE

CAR INITIAL & NO.	WAYBILLED FROM	TO	DATE, SERIES & NO.	COMMODITY	FREIGHT BILL NO.
SP 153630	St Louis Mo	Moyles Way	12/19 15J-96	mdse	13238

DEMURRAGE

ARRIVAL Mo.	Day	Hour	NOTIFICATION Mo.	Day	Hour	CAR RE-ORDERED Mo.	Day	Hour	CONSTRUCTIVE PLCMT. Mo.	Day	Hour	ACTUAL PLCMT. Mo.	Day	Hour	UNLOADED Mo.	Day	Hour

CAR ORDER NO.	DATE WANTED	CONSTRUCTIVE PLCMT Mo.	Day	Hour	ACTUAL PLCMT Mo.	Day	Hour	LOADED & BILLED Mo.	Day	Hour

STORAGE

ARRIVAL Mo.	Day	Hour	NOTIFICATION Mo.	Day	Hour	DELIVERED Mo.	Day	Hour
12	2		12	3		12	12	11

SOU. PAC. CO. DEC 13 1952 Agent Carrier

WEIGHT { OTHER THAN EXPLOSIVES, ETC. 21500 / EXPLOSIVES & DANGEROUS ARTICLES

REMARKS

15% 25.80

387

2967

FREE TIME (DATES) 3

DAYS @ $ ____ PER DAY

DAYS @ $ ____ PER DAY

DEMURRAGE DUE

...PPRECIATES SUGGESTIONS FROM THE PUBLIC WHICH MAY BE HELPFUL IN IM-
...CE. THE MANAGEMENT WELCOMES, IN PARTICULAR, REPORTS OF UNUSUALLY
...COURTEOUS TREATMENT RECEIVED AT THE HANDS OF OUR EMPLOYES SO THAT
...CH ACTS THE USEFULNESS OF THE COMPANY'S ORGANIZATION TO THE PUBLIC
...GENERAL MANAGER, 65 MARKET STREET, SAN FRANCISCO 5, CALIFORNIA.

M Uquinuva 11 Dec 14

TO **Southern Pacific Company,** DR., FOR DEMURRAGE OR STORAGE

CAR INITIAL & NO.	WAYBILLED FROM	TO	DATE, SERIES & NO.	COMMODITY	FREIGHT BILL NO.
SP 153630	St Louis Mo	Noyes Okla	12/19 15J-96	Mdse	13238

	ARRIVAL			NOTIFICATION			CAR RE-ORDERED			CONSTRUCTIVE PLCMT.			ACTUAL PLCMT.			UNLOADED		
	Mo.	Day	Hour	Mo.	Day	Hour	Mo.	Day	Hour	Mo.	Day	Hour	Mo.	Day	Hour	Mo.	Day	Hour
REQUIRED																		
	CAR ORDER NO.			DATE WANTED						CONSTRUCTIVE PLCMT.			ACTUAL PLCMT			LOADED & BILLED		
										Mo.	Day	Hour	Mo.	Day	Hour	Mo.	Day	Hour

SOU. PAC. CO.
DEC 18 1952
FREIGHT Agent
Carrier

	ARRIVAL			NOTIFICATION			DELIVERED		
	Mo.	Day	Hour	Mo.	Day	Hour	Mo.	Day	Hour
SPOTTED	12	2		12	3		12	12	

WEIGHT { OTHER THAN EXPLOSIVES, ETC. 21500 LBS.
EXPLOSIVES & DANGEROUS ARTICLES ____ LBS.

REMARKS

15%
25.80
387
2967

FREE TIME (DATES) 3
SUNDAYS & HOLIDAYS (DATES) 2
WEATHER INTERFERENCE ____
MILES FROM STATION (CONSIGNEE) ____

____ DAYS @ $ ____ PER DAY
____ DAYS @ $ ____ PER DAY
____ DAYS @ ____ ¢Per 100 Lbs. Per Day
____ DAYS @ ____ ¢Per 100 Lbs. Per Day
____ DAYS @ ____

DEMURRAGE DUE

STORAGE DUE 2967

MAKE CHECKS PAYABLE TO THE COMPANY

RECEIVED PAYMENT FOR THE COMPANY

AGENT, PER ____ CASHIER OR COLLECTOR NA

THE ORIGINAL PAID DEMURRAGE OR STORAGE BILL MUST ACCOMPANY CLAIMS FOR OVERCHARGE

THIS COMPANY APPRECIATES SUGGESTIONS FROM THE PUBLIC WHICH MAY BE HELPFUL IN IMPROVING THE SERVICE. THE MANAGEMENT WELCOMES, IN PARTICULAR, REPORTS OF UNSATISFACTORY AND COURTEOUS TREATMENT RECEIVED AT THE HANDS OF OUR EMPLOYEES. SUCH ACTS BY COMMENDING SUCH ACTS THE USEFULNESS OF THE COMPANY'S ORGANIZATION TO THE PUBLIC MAY BE INCREASED. GEO. T. GWATHMEY, GENERAL MANAGER, 65 MARKET STREET, SAN FRANCISCO 5, CALIF.

M—1 FORM 8 REVISED

Defendant's Ex. No. 62

[redacted] Ex. No. ____

313

GTG

FILED

248

MAR 27 1956

AT ..... O'CLOCK .....
ROY H. JOHNSON
CLERK

AGENCIA JOFFROY

AGENTE DE ADUANAS

APARTADO POSTAL 48

MEMORANDUM

MEXICALI—TEL 477

Nogales, Sonora, a 25 de febrero de 1953

Sr.(es) Penguin Frozen Foods, Inc.
120 So. La Salle St.
Chicago, Ill.

Nogales, Sonora, a 25 de febrero de 1953

Sr.(es) Penguin Frozen Foods, Inc.
120 So. La Salle St.
Chicago, Ill.

Adjunto encontrará(n) nuestra(s) Nota(s) de Gastos
número(s) 57270B and 68142 y demás documentor
relativos.

A T E N T A M E N T E,
AGENCIA JOFFROY

Defendant's Ex. No. 63

FILED

MAR 27 1950

AT O'CLOCK
ROY H. JOHNSON
CLERK

OYSTERS, FISH AND
SEAFOOD PACKERS

INVOICE

Maletis Sea Food Co.

SAINT LOUIS MO

828 NO. SIXTH STREET
ZONE 1

GOLDEN DIPT
READY MIXED BREADING
MANUFACTURERS

23390

Refrigeradora De Navarete, S. A.; 5741
c/o Alex Jeffrey, Customs Agent;
Nogales, Arizona en to Refrigeradora Del Norveste,
Mazatlan, Sinaloa, Mexico

DATE Nov. 19, 1952
SHIPPED TO

CUSTOMER'S ORDER NO.	SALESMAN	SHIPPED VIA	F. O. B.	TIME	NO. OF PKGS.	TERMS
		Cotton Belt via Southern Pac.	Ft Pierce		100	1/10 Net 30

QUANTITY	DESCRIPTION	WEIGHT	PRICE	AMOUNT
100	200# Barrels Golden Dipt(Ready Mixed Breading)	20000#	16.19	3238 00

I, John H. Maletis, after being duly sworn, states I am the duly elected President of the Maletis Sea Food Corp., (A Corporation duly licensed by the State of Delaware of the United States of America) and that the above information is true and correct.

John H. Maletis

John H. Maletis, Pres. Maletis Sea Food Company (A Corporation.)

Subscribed and sworn to before me this 10th day of December, 1952.

Ethel F. Kirie

My Commission expires August 1st 1953 Notary Public within and for the City of St. Louis, State of Missouri, U. S. A.

WE GUARANTEE ALL GOODS MANUFACTURED BY US TO COMPLY WITH ALL FEDERAL AND STATE FOOD LAWS—AND ARE PRODUCED IN ACCORDANCE WITH THE FAIR LABOR STANDARD ACT OF 1938.

Defendant's Ex. No. 64

315

647

AGENCIA JOFFROY

AGENTE DE ADUANAS

APARTADO POSTAL 48

MEMORANDUM

Nogales, Sonora, a 30 de Enero.- - - - - de 195 3.

Sr.(es)

Peruin Frozen Foods,
120 South Le Salle St.
Chicago, 3, Ill.-

146 83
5 16.33
6 63 16

2/4/53

2 Checks -

Adjunto encontrará(n) nuestra(s) Nota(s) de Gastos número(s) 68029.- y demás documentos relativos.

r.m.s.

A T E N T A M E N T E,

AGENCIA JOFFROY

Defendant's Ex. No. 65

310

6-19

FILED
53c.2482
MAR 27 1956,
AT ..... O'CLOCK .....
ROY H. JOHNSON
CLERK

INVOICE

Hamilton Foods, Inc.

Our New Home
723 W. FULTON STREET
FINANCIAL 6-4636

301-15 N. HALSTED STREET • CHICAGO 6, ILLINOIS

Phone Chesapeake 3-1167 3-1168

PROCESSORS OF FROZEN FOODS

SOLD TO

Penguin Frozen Foods,
120 So. La Salle Str.
Chicago, Illinois

DATE Dec. 31, 1952

OUR INVOICE A 3649

YOUR ORDER No.

BROKER:

TERMS:

SHIP TO: Nogales, Arizona

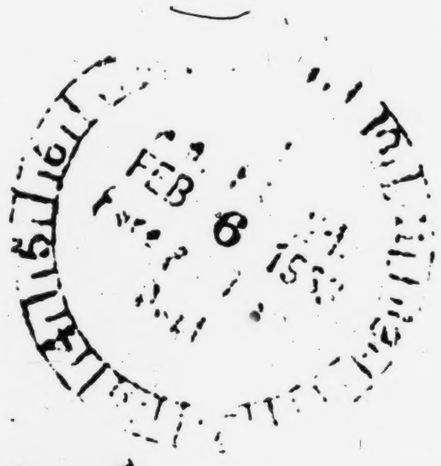
F.O.B.—OUR FACTORY

27 cases (200 per case) 2-1/2x9-1/2x5-1/4 Boxes	$ 43.23 per M	$233.44
176,000 - 5 1/4 x 4 inserts	.71 per M	124.96
9,000 9 1/2 x 5 1/4 Inserts	1.45 per M	13.05
Denver-Chicago Pro no. 2-588629 to Nogales Arizona		71.29
" " Pro No. 2588224 to Nogales Arizona		4.75
		$447.49

PAID
1814
3-26-53
PER.....

Thank You!

ALL CLAIMS MUST BE MADE WITHIN 36 HOURS AFTER RECEIPT OF GOODS



Defendant's Ex. No. 66 It

31.

669

FILED

MAR 27 1956

AT ... O'CLOCK ...
ROY H. JOHNSON

PATENTE No. 660
REGISTRO LOCAL No. 25

AGENCIA JOFFROY

RODOLFO JOFFROY M.
AGENTE ADUANAL

P. O. Box No. 800 NOG., ARIZ.
APDO. POST. 46 NOG., SON.
TELS. 347 y 369

68029 68029.-

Refrigeradora del Noroeste, S. A.,
Mazatlán, Sinaloa.-

Fecha de Despacho 1/24/53
Date of Shipment

Solicitud No. ____

Cía. Penguin Frozen Foods,
120 South La Salle St.,
Chicago, 3, Ill.-

Ped. 31 Reg. No. 586

Muy Sr. (es) mio(s) y Amigo(s)

Boleta No. ____

He despachado en esta Aduana 100 tambores con harina,
We have reforwarded
Recibidos de Meletio Sea Foods Company -- Saint Louis, Mo.
Received from
y embarcado por Carretera a la consignación de Refrigeradora del Noroeste, S. A.,
and shipped by to
Mazatlán, Sinaloa.-

He cargado en su apreciable cuenta:
have charged your good account

$ 663.16 MONEDA AMERICANA U. S. Cy.
$ ____ MONEDA MEXICANA Mexican Money

importe de mi Nota de gastos según especificación al calce, que suplico atentamente situarme en esta ciudad, LIBRE DE TODO GASTO y en la misma especie de moneda especificada
to cover expenses and our commission as specified below
Kindly favor us with your remittance to cover at your earliest convenience

FURGON No.

FACT. No. 23390
Guías Núms. 12383 y 12384 (Sonot)
1/24

Peso 875 kls.

Su afmo., atto., amigo y S. S.
Yours Very Truly
RODOLFO JOFFROY M.

	ESPECIFICACION	MONEDA AMERICANA	MONEDA MEXICANA
1	Flete al Freight to)Almacenaje en Nogales, Ariz., Cta. adjunta	29.67	
2	Flete al Mexican Freight No Coop.Sonot a Mazatlan,Sinaloa en Nogales, Son. Cta. adjunta		4,443.50
3	Despacho Americano sg Cta. No. American C. H. Brokers Fee Etc.		56.33
4	12% S Aforo de $ Mexican Export Tax		
5	Manifiesto Consular Mexican Consular Manifest		
6	Shippers Export		
7	Val Merca. Dols. Value of Merchandise $ 3,238.00	-.-	
8	Timbres, Documentos y Menores Documentary Stamps	-.50	
9	Revisión y carga en Nogales, Ariz. Inspection of Merchandise at Nogales, Ariz.	3.50	
10	Acarreos Drayage)al Almacen en Nog.Ariz. y Nog.Son.	8.50	150.00
11	Despacho y carga en Nogales, Son. Labor of Customs Inspection at Nogales, Son.		75.00
12	Derechos pagados en la Aduana Mexicana Duties Mexican Custom House Afianzados		-.-
13	Alambrar y Sellar Bracing & Marking Bultos Pkgs.)Derechos de Inspección		3.63
14	Conversión $ 5,344.17 a Dlls. 0.1162	620.99	
15	Fianza Bond S/$ 14,710.21 a 1.5% más 5% S/vr.prima		231.68
16	1 telegrama		5.00
17	1 Certificado Sanitario		3.00
18	Ns Honorarios sg Tarifa Oficial Our Commission 0.90% S/$ 47,995.89		431.96
	INCLUSOS:- Enclose:-		
	( ) Conocimiento Original ( ) Original BL ( ) Copia Liqda. Aduanal S. E. u O.	663.16	##########

Defendant's Ex. No. 67

NOTAS:-Para informes o reclamaciones sobre esta remesa, citese siempre el número y fecha de esta nota. NO SE CONSIDERA RESPONSABLE ESTA AGENCIA POR MULTAS QUE RESULTEN POR ERRORES NO ORIGINADOS POR ELLA. Entregada esta remesa al expreso o a los ferrocarriles, cesa nuestra responsabilidad.

NOGALES, SON., 27 de Enero de 1953.-

NOTA DE GASTOS No: 68029.-
Expense Bill No.

(650)

FILED

MAR 27 1956

AT ___ O'CLOCK ___
ROY H. JOHNSON
CLERK

Form No. 13. DUPLICATE FREIGHT BILL

Denver Chicago Trucking Co. Inc.

Transcontinental Freight Service

PRO. NO. 2-588224

CONSIGNEE—DESTINATION | DATE

REFRIGERADORA DEL NORESTA % ALEX JOFFRAN CUSTOM AGENT NOGALES ARIZ | 11/25/52

ROUTE VIA

SHIPPER—POINT OF ORIGIN | SHIPPER'S NO.

HAMILTON FOODS INC 723 W Fulton AVE CHGO ILLL.

ORIGINATING CARRIERS—PRO NUMBERS

ADV.	D. C.	C. L.	CTG.
		83	

NO. OF PACKAGES AND DESCRIPTION	WEIGHT	RATE	CHARGES	
1 ROLL LABELS	100	M	4 61 14	
			4 75	Prepaid...

RECEIVED
11/29/52.
HAMILTON FOODS
CH# 6904

PAST DUE
PLEASE REMIT TO DENVER CHICAGO TRUCKING CO.
2030 SO. ASHLAND AVE., - CHICAGO 3, ILL.

I.C.C. REGULATIONS REQUIRE THAT ALL FREIGHT BILLS BE PAID WITHIN 7 DAYS.

ORIGINAL BILL MUST ACCOMPANY ALL CLAIMS FOR LOSS OR DAMAGE

Defendant's Ex. No. 15 M.

319

(FILED

MAR 27 1956)

AT O'CLOCK
ROY H. JOHNSON
CLERK

~~SALES MEMORANDUM~~

Hamilton Foods, Inc.

Nº 650 1084

Telephone
Chesapeake 3-1167

301 N. Halsted Street Chicago 6, Illinois

PLEASE NOTE OUR NEW ADDRESS
AND TELEPHONE NUMBER

For Account of

Penguin Frozen Foods, 3438 W. MONTROSE AVENUE
CHICAGO 18, ILLINOIS
INDEPENDENCE 3-7640

Date Dec 31, 1955
Customer Order No.

Invoice To	Ship To
Penguin Frozen Foods 120 So. La Salle Str., Chicago, Illinois	Refrigeradora Del Norests Alex Joffroy Customs Agent Nogales, Arizona

Terms
When Ship
How Ship
F.O.B.

Routing

Quantity	Size	COMMODITY	Price	Doz.	TOTAL
4 rolls (6250 sv per roll)		10 oz. Overwraps	25,000 @ 9.75 M		$ 243.75
3,000	2 1/2#	Labels		10.50 M	31.50
					$ 275.25

Cd 9/9/53
dk 7-49 7i

HAMILTON FOODS, INC.

Defendant's Ex. No. 69

6552

32

FILED
53 C 248
MAR 27 1956.)

AT ____ O'CLOCK ____
ROY H. JOHNSON
CLERK

Form No. 18. DUPLICAT ...IGHT BILL

Denver Chicago Trucking Co. Inc.

Transcontinental Freight Service

PRO. NO. 2-586629

CONSIGNEE—DESTINATION

REFRIGERADORA DEL NOROESTS & ALEX JOFFROY CUSTOMS AGENT NOGALS ARIZ.

DATE 11/26/52

ROUTE VIA

SHIPPER—POINT OF ORIGIN

HAMILTON FOODS INC 723 W FULTON ST CHGO ILL.

SHIPPER'S NO.

ORIGINATING CARRIERS—PRO NUMBERS

ADV.	D. C.	C. L. 9.18	CTG.

NO. OF PACKAGES AND DESCRIPTION	WEIGHT	RATE	CHARGES	
34 CTNS PAPER GOODS	900	769	69 21 2 08 71 29	Prepaid....

HAMILTON FOODS
CH # 6904

11/29/52.

327

PAST DUE

PLEASE REMIT TO DENVER CHICAGO T...
303... SO. ASHLAND AVE., - CHIC...

I.C.C. REGULATIONS REQUIRE THAT ALL FREIGHT BILLS BE PAID WITHIN 7 DAYS.

ORIGINAL BILL MUST ACCOMPANY ALL CLAIMS FOR LOSS OR DAMAGE

Defendant's Ex. No. 70

321

653

FILED
53 C 248
MAR 27 1956
AT ___ O'CLOCK ____
ROY H. JOHNSON
CLERK

OYSTERS, FISH AND SEAFOOD PACKERS

INVOICE

Mobile Sea Food Co.

828 NO. SIXTH STREET
ZONE 1

GOLDEN DIPT
READY MIXED BREADING
MANUFACTURERS

23390

PENGUIN FOODS 5741
120 SO. LA SALLE ST.
CHICAGO, ILLINOIS

NOTE: Freight allowed up to and including $1.60 CWT only, on shipments of 175 Lbs. or more.

DATE NOV. 19, 1952
SHIPPED TO REFRIGERADORA DEL. NORVESTA, S. A.
C/O ALEX JOFFROY, CUSTOMS AGT
NOGALES, ARIZONA
ON TO-
REFRIGERADORA DEL. NORVESTA
MAZATLAN, SINALOA, MEXICO

CUSTOMER'S ORDER NO.	SALESMAN	SHIPPED VIA	F.O.B.	TIME	NO. OF PKGS.	TERMS
		COTTON BELT	PPD FRT		100	1/10 NET 30

QUANTITY	DESCRIPTION	WEIGHT	PRICE	AMOUNT
100	200 LB BARRELS GOLDEN DIPT	20,000#	16.19	3238 00
		less 1%		32 38
				3205 62

PAID
1551
1-16-5
C. ON THIS SHT.

GOLDEN DIP
READY MIXED BREA

WE GUARANTEE ALL GOODS MANUFACTURED BY US TO COMPLY WITH ALL FEDERAL AND STATE FOOD LAWS—AND ARE PRODUCED IN ACCORDANCE WITH THE FAIR LABOR STANDARD ACT OF 1938.

Defendant's Ex. No. 71

322

69

323 **DEFENDANT'S EXHIBIT NO. 73.**

(Filed Mar. 27, 1956. Roy H. Johnson, Clerk.)

November 11, 1952.

Jose Saenz Asunsolo,
Nacional Financiera,
V Carranza 25,
Mexico D F Mexico.

Dear Pepe:

Evidently you have overlooked changing the trust receipts on the shrimp at the First National Bank to read "90 days" as we discussed on the telephone or, better still, "when sold". Please take care of this immediately.

Happy to report that we have made a deal on the breading to be sent to Mazatlan in carload lots at $16.19 per cwt, delivered Mazatlan. We will pay for it here and you will not have to worry about that.

We are working on the label and in the meantime will try to sell some private label to keep the plant operating. I have also made arrangements with the people that we buy the breading from to send a man to Mazatlan for a week or ten days to teach the girls everything regarding proper packing and breading of the shrimp.

Hope this finds the family in good health and love to all.

Very truly yours,
Penguin Frozen Foods,
Henry Appelbaum.

324 DEFENDANT'S EXHIBIT NO. 74.

(Filed Mar. 27, 1956. Roy H. Johnson, Clerk.)

Western Union.

1953 Feb 4 AM 10 33

LAO72

L. TSA148 Mex 19 NL PD-NJ Mazatlan Sin Mex via Fedmex Feb 3 Penguin Frozen Foods—
120 South La Salle St Chgo-1.

Retreutel Our Machine Has Red Phototube Top Still No News About Deveining Machines Which Prevents Us From Starting Operation—

Refrigeradora Del Noroeste S A—

325 DE ENDANT'S EXHIBIT NO. 75.

(Filed Mar. 27, 1956. Roy H. Johnson, Clerk.)

(Letterhead of Meletio Sea Food Co., Saint Louis 1, Mo.)

February 17, 1953.

Penguin Foods, Incorporated,
120 South LaSalle Street,
Chicago, Illinois.
Attention: Mr. Henry Appelbaum:

Dear Henry:

Just finished talking with Ray Jensen who is now hospitalized in Houston, Texas. Ray ran into the flu in Mexico and is laying over there for a couple of days.

Ray reported to me that the first day in Mazatlan, they breaded 350 boxes. The second day they breaded over 900 boxes. However, Henry, you are probably aware that the Mexican operation is waiting for overwraps before continuing. Ray states that they did not even go through one barrel of Golden Dipt in these experimentations, but is fully satisfied that the Mexican operation is fully understood and the production line is well set and established. In other words, he feels no need to return to Mexico, in as much as they have got the line completely set up now.

The writer is just taking the liberty of reporting the above information to you and some time next week at the Brokers' Convention, I will have Ray Jensen call you and give you the complete details. Best regards.

Very truly yours,
Melitio Sea Food Company,
Golden Dipt Division,
J. H. Meletio,
President.

JHM:mkh

326 DEFENDANT'S EXHIBIT NO. 76.

(Filed Mar. 27, 1956. Roy H. Johnson, Clerk.)

In the United States District Court.
* * (Caption—53-C-2482) * *

DEPOSITION OF MILO A. HEFFERLIN.

March 1, 1955.

328 Be It Remembered that pursuant to Notice hereto attached, on Tuesday, the first day of March, 1955, at the hour of 11:30 a. m., at the Bank of America, 300 Montgomery Street, San Francisco, California, before Ruby Ann Puett, a notary public in and for the City and County of San Francisco, State of California, personally appeared

MILO A. HEFFERLIN, who, having been first sworn, gave the following testimony:

Direct Examination by Mr. Stanford Clinton.

Q. Will you please state your name?
A. M. A. Hefferlin.
Q. And it is Milo?
A. M-i-l-o, initial A.
Q. Where do you reside, Mr. Hefferlin?
A. 2033 Del Norte Street, Berkeley, California.
Q. And what is your business or occupation?
A. Bank officer.

Q. Of which institution?

A. Bank of America, NTSA, San Francisco.

329 Q. What were those initials?

A. N-T-S-A, National Trust and Savings Association.

Q. And which particular division of the Bank of America are you associated with?

A. The International Banking Department.

Q. And where is that physically housed?

A. 300 Montgomery Street, San Francisco, California.

Q. And is that building generally known as the Main Office of the Bank of America?

A. Yes.

Q. How long have you been connected with the Bank of America?

A. Since July 1936.

Q. Continuously since?

A. Continuously.

Q. And how long have you been connected with the particular department with which you are now associated?

A. Since November of 1949, give or take a month or so.

Q. What is the technical name of your department, again?

A. International Banking Department.

Q. And what, in detail, is the activity or function of that department?

A. All relationships or business transactions with foreign countries are handled through this department.

Q. What kind of transactions?

A. Extensions of credit, exchange, foreign collections, credit investigations and reports, banking arrangements—that covers the field.

Q. And in what particular kind of work are you engaged in this department?

A. I have the responsibility for supervising our relationships in Latin America and in Canada.

330 Q. And in what particular field? Do you blanket the department?

A. No, that has to do with the extension of credit in those areas.

Q. So that it would be correct to say, Mr. Hefferlin, that your duties have to do with extending credit in international transactions?

A. In this particular area.

Q. Do you have anything to do with collections?
A. Nothing.
Q. Were you so engaged in 1952, 1953 and 1954?
A. Except that in 1952 I was not in charge.
Q. You were in the department?
A. I was in the department, yes.
Q. And now you are chief executive officer of that division of the bank?
A. Under a supervisor, whom I would say is the executive over me.
Q. What title do you bear, sir?
A. I bear the title Assistant Vice President.
Q. And in 1953 who was your immediate superior?
A. Mr. Henry W. Drath.
Q. And what title did he bear, sir?
A. He was vice president.
Q. And was he the chief executive officer of the bank assigned to international banking transactions?
A. No, he was the chief executive assigned to this area.
Q. And by "this area" you mean, do you, the area of San Francisco?
A. No, of Latin America and Canada.
Q. A particular group of foreign countries, is that correct?
A. Yes.
331 Q. Is it correct to say he was chief executive officer of the Bank of America in international transactions affecting Latin American countries?
A. Yes.
Q. Did that include Mexico, sir?
A. Yes.
Q. Do you know a man by the name of Pedro Pinson?
A. Yes, I have sat in conference with him.
Q. When did you first meet him?
A. At the time of the conference, which was in August 1953; July, possibly.
Q. July or August 1953?
A. Yes.
Q. Would that be the first time you had ever met Mr Pinson?
A. Yes.
Q. Where did you meet him?
A. In the International Banking Department conference room.

Q. In this bank?
A. Yes.
Q. And in this building?
A. Yes.
Q. How did you happen to be there?
A. I was instructed by Mr. Drath to attend a conference in which Mr. Pinson took part.
Q. And who else were present?
A. The names are on this—in the material you have—they are not in my memory.
Q. For the purpose of refreshing your recollection: was Oscar Fraustro present?
A. Yes.
Q. And was Isaac Coppel?
A. Yes.
332 Q. And Arturo de Cima?
A. I don't remember him at all; I can't for the life of me recall whether he was or not. My belief is that he was.
Q. Your belief is that he was, but you have no definite recollection?
A. Yes.
Q. Was anybody else present?
A. There were a number of conferences.
Q. This first one, I am talking about.
A. Henry W. Drath was present.
Q. Henry W. Drath?
A. And I believe that was the composition of the conference, to the best of my memory.
Q. You have no other recollection?
A. None.
Q. For the purpose of refreshing your recollection, was there a man by the name of Willis present?
A. Yes.
Q. Do you remember his first name?
A. Jack, we called him.
Q. You knew him as Jack Willis?
A. Yes.
Q. Is this the first time you had ever met any of these men at the conference, with the exception, of course, of Mr. Drath?
A. Yes, sir.
Q. And could that have been August 5, 1953, and could the time have been 2:30 in the afternoon?
A. It could have been.

Q. And was that conference arranged pursuant to a memorandum from your San Diego office?

A. I believe so.

333 Q. Now, will you, as best you can, tell us what occurred at that conference.

A. After the usual amenities of introductions, as I recall, Mr. Fraustro indicated that there was being made in Mexico a revision of the marketing of certain shrimp producers on the Pacific coast of Mexico, as I recall. He indicated that the credit arrangements between Nacional Financiere and Bank of America would be continued—or he wished that they be continued—substantially on the former basis, but that drafts which underlined the credit extension would be drawn on another marketing agent.

Q. Would you name the marketing agent.

A. Crest Importing Company.

Q. And who was the former marketing agent?

A. The former marketing agent was Penguin Frozen Foods.

Q. Of Chicago, Illinois?

A. I want it understood that I did not know that the former marketing agent was Penguin Frozen Foods.

Q. You know that now?

A. I do know that now.

Q. What was your understanding as to whom Mr. Fraustro represented at this conference?

A. Nacional Financiere.

Q. And what was your understanding as to whom Mr. Willis represented at this conference?

Mr. Kohn: I object to what the witness "understands." I don't want any guess about this, or anything like that.

Q. All right. What was said as to what—what was said about the other men at the conference?

A. I was informed that Jack Willis would be in charge of Nacional Financiera shrimp marketing agency in the United States.

334 Q. And that was what company?

A. Crest Importing Company.

Q. What was said about Pedro Pinson—about whom he represented?

A. I was informed that Pedro Pinson represented one of the shrimp producing companies on the Pacific coast of Mexico.

Q. Was anything said about what his connection was, if any, with Crest?

A. Nothing, to my knowledge.

Mr. Kohn: I want to move to strike all those answers to the last three questions.

Q. You said you were informed that Mr. Willis represented Crest, would be in charge of the Crest Importing Company. Do you recall who said that?

A. I don't know.

Q. Was it said at the conference?

A. Yes.

Q. And you were told that Pedro Pinson represented one of the shrimp producers? Did you hear it at this first conference?

A. I can't say. It was part of the discussions which resulted from the information we received that there would be a conference, whether it was at that time or at the conference I don't recall.

Mr. Kohn: I object to that question, and move the answer be stricken.

Q. You can answer subject to the objection.

A. It was my understanding that he would represent a marketing agency for the group of shrimp producers.

Q. For shrimp producers?

A. That was my understanding.

Q. What was said, if anything, about whom Isaac Coppel represented, at this first conference?

335 A. At the time, he was introduced—Whoever made the introduction stated he represented one of the shrimp producers in the group.

Q. And you don't remember what, if anything, was said about Arturo deCima?

A. I don't know.

Q. What else was said at this conference, and by whom, if you can recall.

A. The conference lasted for well over an hour, as I recall, and to try to recapitulate everything said would be physically impossible for me. The basis for our previous extension of credit to Nacional Financiere was discussed, the changes, if any, envisaged in the proposed procedure were discussed in a general way; and to the best of my knowledge that is the subject matter and all that was spoken of.

Q. So far as you know, Mr. Hefferlin, was any memorandum made of that conference by you or any other officer, official or employee of the Bank of America?

A. To the best of my knowledge, none was made following the first conference.

Q. Now, Mr. Hefferlin, I will show you Exhibit 1 for identification.

(Defendant's Exhibit 1 identified.)

Mr. Clinton: Have you any objection, Mr. Kohn?

Mr. Kohn: I have no objection to the identification, as to its authenticity.

Q. I will show you this. It is a communication dated August 4, 1953 from the San Diego main office, No. 50, of the Bank of America, and addressed to Mr. Henry W. Drath, International Finance Headquarters, signed by one K. A. Nairne. I ask you to examine the document and to establish whether or not you have seen it before.

336 A. I have seen it before.

Q. Where did you see it?

A. In the International Finance Credit file.

Q. And was this document a part of the permanent file of your bank?

A. It is, yes.

Q. It concerns the transactions here being discussed, is that correct?

A. Yes.

Q. Will you read the document and state whether it refreshes your recollection as to whom some of these men at the conference, about which you have testified, represented.

A. It does not refresh my memory because these names—these men mean nothing to me at all.

Q. What I had in mind in particular was the statement in the communication to the effect that Mr. Jack Ellis, a representative of Crest Importing Company, had an appointment. And then following the names it says, "The latter three gentlemen" will be the Crest Importing Company, Inc., and each are shrimp producers.

A. Yes.

Q. Does that statement in that communication refresh your recollection as to anything that might have been said as to who Pedro Pison, Isaac Coppel or Arturo deCima—at this conference?

A. No, it does not.

Mr. Kohn: Let's move on, counsel. I think you have exhausted that.

Q. So far as you know, that is all that took place at that first conference?

A. Yes, sir.

Q. The meeting was adjourned—I imagine it was
337 about the tail end of the afternoon about then.

A. I imagine.

Q. When did you next meet?

A. I have no definite memory as to when the next meeting took place. As I recall, there were three or four meetings, and whether the next one was the next morning or the following afternoon, I don't recall.

Q. It was within a day or two?

A. Yes.

Q. Where did it take place?

A. It was in the International Banking Department in this building.

Q. In the same place as the first meeting?

A. Yes.

Q. Was there a Jack Ellis there?

A. Not to my knowledge.

Q. Have you any comment on it, referring to a Jack Ellis in this document marked Defendant's Exhibit 1 for identification?

A. No comment, no, sir.

Q. There was a Jack Willis, but no Jack Ellis.

A. That is right, to my knowledge.

Q. And you have never heard of a Jack Ellis in any way connected with this transaction, is that right?

A. Yes.

Q. So far as you know, there is no Jack Ellis who had anything to do with these transactions, but it was Jack Willis?

A. Yes.

Q. Do you remember when the second conference was held, a day or two later?

A. Yes.

Q. Do you remember who was present?

338 A. I believe that the same people were present as at the first conference.

Q. And what was said by the various people present?

A. It would be impossible for me to repeat verbatim. We continued from the first discussion and went more into detail regarding interest rates, collateral for the bank—in other words, the second conference sharpened up the general discussion of the first and began to put it on a banking basis.

Q. You discussed banking mechanics and banking terms?

A. Yes.

Q. How long did that conference last?
A. I have no memory as to that.
Q. An hour or so?
A. Less than two; possibly an hour or an hour and a quarter.
Q. When was the next conference?
A. Again, I don't recall. I would say it was some time a day or two later.
Q. And was that held here in the bank?
A. In the same room.
Q. Were the same people present?
A. To the best of my knowledge.
Q. And what was said then?
A. At this conference, which I believe was the final one, we informed the gentlemen that we had sufficient information to study the proposal which was before us, that we would, in accordance with our usual custom, discuss it with our credit committee, and that we would inform them in due course whether we would be willing to go along with the financing.
Q. And your recollection is that there were three conferences? Is it possible there were four?
A. Yes.
Q. There could have been three or four. Was a memorandum of any kind made of any of the conferences?
A. Following the conclusion of the conferences, after the men had returned to—I imagine they went to Mexico—we prepared a resume of the proposal as it was presented to us, together with a rough draft of the modus operandi.
Q. Do you have that document?
A. You have it before you, I believe.
Q. Will you fish them out and we will identify them.
(Defendant's Exhibit 2 identified.)
I show you Defendant's Exhibit 2 for identification and ask you if this is the document which was summarized and about which you have just testified, for submission to the credit committee.
A. Yes, I identify the document as such. I would point out that it does not summarize the entire conference, which was never summarized in writing.
Q. Was there any other summary or memorandum of any kind in connection with those conferences?
A. No.
Q. Prior to this time, you say, your institution had had some dealings with Nacional Financiere of Mexico?

A. Yes, sir.

Q. And that was in connection with the marketing of the product of the company known as Reno? Refrigeradora Del Noroeste, S. A.?

A. Yes.

Q. That is the company we refer to as Reno from now on, is that correct?

A. Our relations with Nacional Financiere included such financing.

340 Q. For this producer?

A. Yes.

Q. Up to this time—I am talking about the conference in 1953—had you had any other financing arrangements with Nacional Financiere for any other shrimp producer?

A. I wasn't aware of any.

Q. Would you have been aware of such financing if, in fact, there had been any?

A. I believe I would have.

Q. You were head of the department at that time?

A. No, at that time I was not.

Q. You were not?

A. No.

Q. You know of none?

A. I know of none.

Q. I take it you could by a very brief investigation ascertain the situation.

A. Yes.

Q. Will you do that during the noon hour?

A. Yes.

Q. At these conferences was anything said as to the ownership of Crest Importing Company?

A. Yes, sir. During the conferences I was informed that the group of shrimp producers in Mexico collectively owned Crest.

Q. What was the name of the collective group of shrimp producers?

A. I don't know.

Q. Did you hear them at the time?

A. I believe not.

Q. Was it your understanding that Reno—

Mr. Kohn: He has already said he doesn't know.

341 Q. Was anything said at any of the conferences about Reno being one of the producers?

A. Not to my knowledge.

Q. It is your understanding that Reno is one of the producers?

Mr. Kohn: I object to these questions and answers.

Q. Did you ever get a list of those producers?

A. I believe not.

Q. Did you ever get an estimate of their production?

A. No.

Q. Did you ever get an estimate of the amount of money they would need?

A. Only through the application of Nacional Financiere, which we were studying.

Q. Did you ever get a statement in writing as to the stock ownership of Crest or its capitalization?

A. Not to my knowledge.

Q. Do you have any knowledge as to whether or not the bank has in its possession the bylaws and memoranda as to the corporate structure of Crest?

A. I have no knowledge of such information in our files.

Q. What was your understanding as to whom or to what you were extending credit in connection with these transactions?

A. My understanding was and is that we were extending credit to Nacional Financiere.

Q. Secured by what?

A. We had no security, no actual security.

Q. Was it an open line of credit?

A. It was open to the extent that we considered ourselves unsecured.

342 Q. You extended this open line of credit based upon your knowledge of Nacional Financiere?

A. Yes.

Q. In previous transactions and dealings, is that correct?

A. Yes, that is correct.

Q. What, if any, connection, so far as you know, did Oscar Fraustro have with Reno?

A. I wasn't aware of any.

Q. And if I told you he was on the board of Reno, that would be news to you?

A. That's right.

Q. What, if any, connection did Nacional Financiere have with Reno?

A. I don't know.

Q. Well, didn't you know, as a matter of fact, that Nacional Financiere controlled Reno?

A. Since reading the letter which I have given you—that is the first knowledge I had of it.

(Defendant's Exhibit 3 identified.)

Q. I show you—I ask you to examine this letter, which purports to be a letter on the stationery of the Bank of America. Is that the letter to which you refer?

A. Yes.

Q. The letter is addressed to Mr. Henry W. Drath, your superior?

A. Yes.

Q. Where is Mr. Drath?

A. In New Orleans.

Q. In connection with the international conference?

A. Yes.

Q. Where is he assigned?

A. To the International Banking Department in this building.

343 Q. Is he absent only for that conference in New Orleans?

A. Yes.

Q. Who is Juan March?

A. He is the Bank of America representative in Mexico.

Q. And he is an employee of the Bank of America?

A. Yes.

Q. You don't know whether the bank has in its possession copies—documents purporting to be copies of the corporate records of Crest?

A. I don't know.

Q. Is it the practice of your bank, in connection with transactions of this kind, to get the names of the officers of companies with which you are dealing?

A. Not invariably.

Q. Is it the practice to get a statement of capitalization?

A. Only when we rely on such capitalization for security.

Q. So that in this instance you did not rely on the capitalization of Crest, or Reno, or any participating fishermen or shrimp producers?

A. No.

Q. Solely and entirely on the credit of Nacional Financiere?

A. Yes.
Q. Is that correct?
A. That is correct.
Q. You do not know whether there is any of this corporate information in your files?
A. I don't know.
Q. Who would know in the bank?
A. It would be necessary to search the files, both here and in San Diego.
Q. Doesn't the Bank of America have a practice, in connection with the extension of credit, even as to a
344 responsible debtor like Nacional Financiere, to get the details of the needs of the debtor or a prediction as to the needs of the debtor, and on what it is based? Do you understand my question?
A. Will you repeat it.
Q. Is it the practice of the Bank of America, in extending a line of credit to a responsible debtor or a prospective responsible debtor, like Nacional Financiere, to get an estimate or a prediction of the credit needs, and on what those predictions are based?
A. I can't speak for the entire Bank of America. It is the custom of the Latin American Section, when we have an application for a line of credit, not to go into the reasons beyond the fact that it is normal banking procedure.
Q. I wasn't asking for the reasons because that is usually lack of money. What I am talking about is an estimate as to how much money will be needed.
A. Yes.
Q. And isn't that usually backed up in your institution with a statement of why the amount would be needed—how much shrimp would be produced, and by whom?
A. I believe there is no flat answer to your question. In this case we would accept the responsible borrower's statement that they believed a certain amount of financing would be necessary in connection with their marketing of shrimp.
Q. I see. In other words, you were completely satisfied that whatever Nacional Financiere sought to borrow, and for whatever purpose, would be repaid because there was ample security, so far as you were concerned.
A. In addition, each request for financing would be accompanied by documents covering shipments of shrimp.
345 Q. Do you know who owns Crest Importing Company?

A. No, sir.

Mr. Kohn: The man has said he doesn't know. Why do you want him to guess?

Q. What is your understanding of who owns Crest Importing Company?

A. My understanding is that a group of Mexican shrimp producers own it.

Mr. Kohn: I object. I move that be stricken.

Q. Have you ever heard of Exportadores Associados?

A. No.

Q. At any of these conferences were you told that Reno was under a contractual relationship with Penguin Frozen Foods of Chicago which would prevent its participating in this marketing arrangement?

A. No, sir.

Q. Were you ever told that?

A. No, sir.

Q. Were you ever told there was a controversy about it?

A. My first knowledge that there was a controversy was in a wire from Chicago. I believe you have it; it is in the material which Mr. Putnam is preparing.

Q. When did you see that wire?

A. On the date of receipt, I believe.

Q. Did you do anything about it?

A. I telephoned to Mr. Putnam and told him to take all steps to make certain we were giving this collection every attention in accordance with banking procedure.

Q. That was with reference to collection?

A. Yes.

Q. You did not understand that to have anything to do with the contractual obligation of Reno?

346 A. Yes.

Q. You thought it was an argument about a package bill?

A. I realized there was more since there was a wire but since it did not concern the Bank of America I took no action.

Q. You did not feel it had anything to do with what was previously discussed at the conferences?

A. No, sir.

Q. Is that correct?

A. Correct.

Q. When did you become head of your department?

A. Officially, in May 1954.

Q. Am I correct in saying that as a result of the formalization of arrangements discussed at these three conferences, Bank of America did extend a line of credit?

A. That is correct.

Q. And that line of credit has been in existence continuously down to date.

A. Yes, sir.

Q. Now, Mr. Hefferlin, you have produced from your files all the documents in your department which are relevant to these particular transactions that we discussed in your testimony this morning?

A. I have.

Q. And do I understand you to say that there was no other document in your files, so far as you know, that has anything to do with Crest Importing Company Exportadores Associados, S. A., or with Nacional Financiere, so far as these particular transactions are concerned?

A. That is correct.

Q. And if there are any such documents you have no knowledge?

A. I have none.

347 Q. All these documents are under your direct supervision and control?

A. Yes.

Q. And you are familiar with all the documents in these files?

A. Yes.

Q. I think that is all, except that I would like to have you confirm that no other credit was extended to any other shrimp producer.

A. Yes.

Cross-Examination by Mr. Kohn.

Q. What is Nacional Financiere?

A. It is an organization set up by the government of Mexico, financed with federal funds. I could best describe it by saying it is similar to our Reconstruction Finance Committee.

Q. As such, does it produce shrimp itself?

A. It does not.

Q. So when you testified that the conferences had to do with the marketing of Nacional Financiere shrimp, what did you mean?

A. I meant Nacional Financiere had requested our co-operation in financing the marketing of shrimp in the United States.

Q. And this line of credit extended since then, does that involve shrimp sold by Reno?

A. I believe it does. The line of credit does not restrict it to any seller, any producer—it's just for shrimp shipped to the United States.

Q. Under the auspices of Nacional Financiera?

A. Yes.

348 Q. So there could have been an extensive line of credit that didn't have anything to do with Reno?

A. Yes.

Q. Just a broad coverage of the shrimp industry?

A. Yes.

Q. And it might or might not include Reno shrimp?

A. It might or might not.

Q. And you don't take it as including Reno shrimp for the entire time since the making of the original loan?

A. No, I do not.

Q. And you are not certain whether or not prior to this conference of August 1953 that there was no financing of other shrimp, other than Reno. That is what you are going to check on?

A. Yes.

Q. You didn't know of any connection between Mr Fraustro and Reno until just the other day, is that correct?

A. That's right.

Q. And when did you learn of the connection between Nacional Financiera and Reno?

A. I believe at the conference, or just prior thereto.

Q. Did you have any connection with the law firm in New York, Harden, Hess and Eder?

A. Not to my knowledge.

Q. No contact? With Monroe Colombez?

A. Not to my knowledge.

Redirect Examination by Mr. Clinton.

Q. Have you any way to ascertain the individual producers of shrimp that were financed by loans from the Bank of America?

A. I believe it would be necessary to go to Mexico
349 to our borrowers, Nacional Financiera, for that information.

A. Yes.

Q. You have no identification, by producer, in your records?

A. Not in my records.

Q. There has never been any identification of the producers?

A. Yes.

Q. It has come through Crest?

A. On draft from Crest.

Q. I was wondering about one of your answers. In response to Mr. Kohn's question that you did not mean to say that Nacional Financiera—did not mean to say Nacional Financiera shrimp, but really you were referring to the producers of those shrimp. Remember your response?

A. Yes.

Q. Is there any distinction in your mind between Nacional Financiera participation or identification in the delivery of these shrimp, whether they were owned directly by Nacional Financiera or whether they were owned or produced by a company controlled by Nacional Financiera—do you recognize a distinction?

A. There would be no distinction on our part.

Q. So that if shrimp were produced by a company controlled by Nacional Financiera, as a banker you would say they were Nacional Financiera shrimp, would you not?

Mr. Kohn: I object to that question.

Q. You see what my question is?

A. Yes.

Q. Do you make a distinction in your thinking as a banker as to whose shrimp they are, whether owned by Nacional Financiera, produced by Nacional Financiera, or by a company controlled by Nacional Financiera.

A. There would be no distinction in my mind.

2550 Q. In both cases the shrimp would be the shrimp of Nacional Financiera.

A. In both cases it would be shrimp which was sold in the United States, the proceeds of the sale of which were to go to Nacional Financiera.

Q. Whose shrimp would you say they were?

A. I would not be called upon to decide.

Mr. Kohn: I object to that line of reasoning.

Q. When you answered Mr. Kohn, you said you did not mean they were Nacional Financiera, you meant to say they were shrimp of the individual producers. Do you recall that response?

Q. Will you state what your thinking is with respect to that response. In the two cases I put to you, do you see a distinction there?

A. It is rather difficult. I can clarify my reply by saying that a financial institution such as Nacional Financiera has never been the owner or producer of shrimp. It has been my understanding that they finance the export of shrimp for producers in Mexico, whether they owned or controlled it, acted on consignment basis, or otherwise.

Q. If the fact was that Nacional Financiera owned the majority and controlling stock of Reno, would you, as a banker, say they were not Nacional Financiera shrimp, that is what I am asking you.

Mr. Kohn: I want to object to your arguing with the witness. You're asking him for legal conclusions.

Q. Subject to his objection, how do you answer?

A. I am not a lawyer and couldn't trace the ownership.

Q. You don't know who the owner is?

A. That is right.

351 Q. You don't know whether they were owned by Nacional Financiera. You are not taking a position?

A. I am not taking a position.

Q. Is your answer still the same: that these are the shrimp-producers shrimp. Or, in the light of this letter from your own employee, Mr. Juan March—

A. I maintain my answer: I don't think that "control" means "ownership," particularly. I am unable to say.

Q. You don't know the facts, are not a lawyer and are not taking a position.

A. That's right.

Recross Examination by Mr. Kohn.

Q. Mr. Hefferlin, you do know enough to say, do you not, that Nacional Financiera is a financial institution and not a producer of shrimp.

Mr. Clinton: I object. You are arguing with the witness.

A. I believe I know enough to say that Nacional Financiera is not a producer of shrimp. It is a financial institution set up in Mexico.

Q. Do you still say that they had control of the shrimp producers?

A. That is still my answer, subject to the qualification that I am not a lawyer.

Witness excused.

352 And, to wit, on the 13th day of June, 1955, being one of the days of the regular June, 1955 term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William J. Campbell, District Judge, appears the following entry, to wit:

353 IN THE UNITED STATES DISTRICT COURT

* * (Caption—53 C 2482) * *

This being the day to which this cause was continued for further trial again come the parties by their counsel and the Jury impaneled and sworn herein also come and the trial proceeds and at the close of defendant's evidence the plaintiff by its counsel enters its motion to strike the counterclaim of defendant based on an oral contract for the breading of shrimp and its motion to strike all portions of the testimony and all exhibits pertaining to such breading operation and the Court now having heard the arguments of counsel and being fully advised it is

Ordered that each and both of said motions be and the same hereby are granted and that portion of the counterclaim be and the same hereby is stricken and the trial proceeds and at the close of all the evidence the plaintiff by its counsel enters its motion for a directed verdict and the defendant by his counsel enters his motion for a directed verdict and said motions hereby are taken under advisement until after the return of the Jury and the hour of adjournment having arrived it is

Further Ordered that the Jury be permitted to separate until June 14, 1955 at 10:00 A. M.

* *

354 And on the same day, to wit, the 13th day of June, 1955, came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Motion for Directed Verdict in words and figures following, to wit:

355 UNITED STATES DISTRICT COURT.

* * (Caption—53-C-2482) * *

MOTION OF PLAINTIFF FOR DIRECTED VERDICT.

Plaintiff at the close of all the evidence on the complaint, and on defendant's amended counterclaim, moves the court to (1) direct a verdict for plaintiff upon the cause of action alleged in plaintiff's complaint, to instruct the jury to return a verdict for plaintiff, and to find in favor of plaintiff and against defendant in the principal sum of $210,878.29, together with interest thereon as provided by law, and (2) to direct the jury to find the issues for plaintiff as to the causes of action asserted in defendant's amended counterclaim.

As grounds for such motion plaintiff says:

356 1. As to the cause of action set forth in the complaint, defendant has admitted his indebtedness for the shipments of shrimp received by it from plaintiff and the amount owing it by defendant is uncontradicted and proves that plaintiff is entitled to recover from defendant the principal sum of $210,878.29, together with interest thereon as provided by law.

2. As to the cause of action asserted by defendant against plaintiff in its counterclaim based on the alleged breach by plaintiff of the contract between the parties for the shipments of shrimp to defendant, there is no evidence that plaintiff committed any actual breach of that contract and the evidence is uncontradicted that defendant wrongfully failed to make the payments provided in the contract to be made to plaintiff after demand by plaintiff for such payments, and that plaintiff lawfully terminated the contract and was not obligated to make any further delivery of shrimp to defendant after the date of such termination.

3. As to the cause of action asserted against plaintiff by defendant in its counterclaim based on the alleged breach of an alleged oral contract between the parties provid-

ing for the breading of shrimp by plaintiff for the 57 reasons that, (a) it would be against the manifest weight of the evidence to find that any such oral contract was entered into, (b) if any such oral contract were attempted to be entered into by the parties, it was invalid for the reason among others that it was in violation of the provisions of the applicable Illinois Statute of Frauds (1953 Ill. Rev. Stat., Ch. 59, Sec. 1), and (c) it would be against the manifest weight of the evidence that any breach of such alleged oral contract was committed by plaintiff, or that any such breach was the proximate cause of any damage or loss claimed to be suffered by defendant.

Refrigeradora Del Noroeste, S. A.,
By Louis A. Kohn,
Patrick W. O'Brien,
Attorneys for Plaintiff.

Mayer, Friedlich, Spiess,
Tierney, Brown & Platt,
Of Counsel.

58 And on the same day, to wit, the 13th day of June, 1955 came the Defendant by his attorneys and filed in the Clerk's office of said Court his certain Motion For Directed Verdict in words and figures following, to wit:

59 IN THE UNITED STATES DISTRICT COURT
* * (Caption—53-C-2482) * *

MOTION FOR DIRECTED VERDICT

Defendant, at the close of all the evidence, moves the Court to withdraw the evidence on plaintiff's complaint and defendant's answer from the consideration of the jury and to instruct the jury to return a verdict for the defendant on issues raised by said complaint and answer.

And as grounds for the allowance of such motion, the defendant avers that:

1. No evidence has been offered or received upon the trial tending to prove that the plaintiff has fully and completely carried out and performed all of its obligations under the contract of October 19, 1950, and the extension agreement of July 22, 1952, by and between plaintiff and defendant.

2. No evidence has been offered or received upon the trial tending to prove that any amounts of money were due and owing plaintiff by defendant under the contract of October 19, 1950, as extended by the agreement of July 22, 1952, at any time prior to plaintiff's breach of its agreements under the said contract and extension.

3. There is no conflict in the evidence which has been offered and received and which conclusively establishes that plaintiff was guilty of anticipatory breach of contract and that such anticipatory breach preceded in point of time the time at which any payments could be due plaintiff by defendant under the contract of October 19, 1950, as extended by the agreement of July 22, 1952.

4. There is no conflict in the evidence which has
360 been offered and received and which conclusively establishes that defendant did not accept plaintiff's attempted repudiation or renunciation of its anticipatory breach and that at all times it was clearly understood by both plaintiff and defendant that defendant would permit plaintiff to renounce his anticipatory breach and to resume operations under the said contract and extension only upon the giving of certain guarantees, which guarantees were never given.

5. There is no conflict in the evidence which has been offered and received and which conclusively establishes that plaintiff breached the contracts of October 19, 1950, and the extension agreement of July 22, 1952, and therefore plaintiff is not entitled to any damages whatsoever.

Joseph Clayton,
Robert A. Sprecher,
100 W. Monroe Street,
Chicago 3, Illinois,
Attorneys for Defendant.

361 And on the same day, to wit, the 13th day of June, 1955 came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Instructions Requested By The Plaintiff in words and figures following, to wit:

362 UNITED STATES DISTRICT COURT.

* * (Caption—53-C-2482) * *

INSTRUCTIONS REQUESTED BY THE PLAINTIFF.

Now Comes Refrigeradora Del Noroeste, S. A., the plaintiff in the above entitled cause, and requests the Court to give to the jury the nine instructions annexed hereto.

Dated June 13, 1955.

Refrigeradora Del Noroeste, S. A.,
By Louis A. Kohn,
Patrick W. O'Brien,
Attorneys for Plaintiff,
231 S. La Salle Street,
Chicago 4, Illinois.
STate 2-0600.

Mayer, Friedlich, Spiess, Tierney, Brown & Platt,
Of Counsel.

363 You are hereby instructed that in view of the admissions of defendant and the uncontradicted evidence in the record defendant is indebted to plaintiff on its claim in the complaint in the principal sum of not less than $198,838.09 which total sum accrued on the dates hereinafter indicated as follows:

Date	Amount
7/15/53	$ 11,173.10
8/15/53	70,619.52
9/15/53	131,131.46
10/15/53	156,218.06
11/15/53	167,242.18
12/15/53	178,328.07
1/15/54	188,920.25
2/15/54	192,463.27
3/15/54	198,838.09

364 You are hereby instructed that in view of the admissions of defendant and the evidence in the record defendant is indebted to plaintiff on its claim in the complaint for the shrimp admittedly shipped to defendant in the sum of $210,878.29, less deductions for proper expenses shown by the evidence to have been paid or incurred by defendant.

365 You are hereby further instructed that in view of the admissions of defendant and the uncontradicted evidence in the record plaintiff on its claim in the complaint is entitled to interest on the principal sum of $198,838.09 from the dates the amounts aggregating said sum accrued to June 15, 1955, as follows:

Date	Principal Amount	Interest
7/15/53	$ 11,173.10	$ 46.55
8/15/53	70,619.52	294.25
9/15/53	131,131.46	546.38
10/15/53	156,218.06	650.91
11/15/53	167,242.18	696.84
12/15/53	178,328.07	743.03
1/15/54	188,920.25	787.17
2/15/54	192,463.27	801.93
3/15/54	198,838.09	12,427.38
	Total	$16,994.44

366 The jury is instructed that if it should find that defendant failed to make payments, as provided in the contract, for shrimp received by it and sold by it, plaintiff was justified in refusing to make further shipments and such refusal did not constitute a breach of the contract.

You are further instructed that upon defendant's default in making these payments as provided in the contract, plaintiff had the legal right to suspend further shipments and, when the defendant continued to refuse to pay plaintiff after demand that he do so, plaintiff had the right to terminate the contract.

367 The jury is instructed that even if it should find that plaintiff may have, without just cause, desired or attempted to terminate the contract for the shipment of shrimp, and so indicated to defendant but that defendant nevertheless at all times insisted that the contract remain in full force and effect and that both parties thereafter

indicated to each other their desire and willingness to continue to perform under the contract, then you will find that plaintiff's former desire or attempt to terminate the contract did not justify defendant's failure to make the payments provided for in the contract, nor would it permit the defendant to add conditions not authorized by the contract upon which his own continued performance was to depend.

368 The fact that plaintiff is a foreign corporation organized under the laws of Mexico, and having its principal office in that country, must not prejudice your minds against it to any extent whatever. It is entitled to the same fair trial and the same unprejudiced consideration from you as if it were an American citizen. Prejudice, sympathy or any other extraneous matters should not affect your judgment. In other words, it is your duty to give every question in this case a calm, careful and conscientious consideration not influenced by sympathy or any consideration other than the evidence and the law as given to you in these instructions.

369 The court instructs the jury that for the defendant to recover on its counterclaim based upon the written contract against plaintiff it must be shown by defendant by the preponderance of the evidence that he has performed his obligations under the contract with plaintiff.

370 The court instructs the jury that if defendant has any right to recover on his counterclaim against plaintiff, he can only recover actual damages, or such damages as will make good the actual loss sustained by him. However, he cannot recover for damages based on speculation or conjecture.

371 The court instructs the jury that any party claiming damages based on breach of contract must prove by the preponderance of evidence that a valid contract existed, that a breach of such contract occurred, and that damages resulted therefrom. In this case it is incumbent upon the defendant before it is entitled to recover any damages on that part of its counterclaim based upon the alleged oral contract under which plaintiff was to bread shrimp, that defendant prove by a preponderance of the evidence that such alleged contract existed, and was in effect at the time it is claimed plaintiff failed to bread shrimp in violation of the alleged oral contract, and that actual damages resulted to defendant by reason thereof.

372 UNITED STATES DISTRICT COURT.
• • (Caption—53-C-2482) • •

Now comes plaintiff and requests the Court to instruct the jury to sign the attached form of verdict.

Dated June 13, 1955.

Refrigeradora Del Noroeste, S. A.,
By Louis A. Kohn,
Patrick W. O'Brien,
Its Attorneys.

373 UNITED STATES DISTRICT COURT.
• • (Caption—53-C-2482) • •

VERDICT.

We, the jury, find the issues for the plaintiff upon its complaint herein, and that the amount payable to it by defendant, by reason of the premises is the sum of $....., with interest to be added.

We, the jury, further find the issues for plaintiff upon defendant's counterclaim.

.....
Foreman.

374 And on the same day, to wit, the 13th day of June 1955 there were filed in the Clerk's office of said Court certain Instructions Requested By Defendant in words and figures following, to wit:

375 Instructions Requested by Defendant.

The Court instructs the jury that the plaintiff must prove its right to recover under the contract of October 19, 1950, as extended by the agreement of July 22, 1952, by a preponderance or greater weight of evidence; therefore, if the evidence in this case preponderates in favor of the defendant, or if the evidence fails to preponderate in favor of the plaintiff, or if you are unable to say on which side is the greater weight of evidence, then you

should find for the defendant on the issue of plaintiff's right to recover under the said contract and extension.

376 The Court instructs the jury that by preponderance of proof the Court does not mean the largest number of witnesses on a given point; several witnesses may testify to a fact, and a single witness may testify to the contrary but under such circumstances and in such manner and with such an air and appearance of truth and candor as to make it the more satisfactory or convincing to you that the one witness, with the opportunity of knowing the facts testified to, has told the truth of the matter; when you are thus satisfied that the truth lies with a single witness or any other number, you are justified in returning a verdict in accordance therewith. This is what is meant by a preponderance of the evidence or proof. It is that character or measure of evidence which carries conviction to your minds.

377 The Court instructs the jury that any admissions that may have been proved by a preponderance of the evidence to have been made by the plaintiff's agents are proper for the jury to consider in forming their verdict, and the jury will give any admissions, if any are thus proved, such weight as they think them entitled to.

378 The Court instructs the jury that if a written contract is ambiguous or does not contain all of the terms and conditions of the agreement between the parties, you may determine the intention of the parties as shown by their conduct and actions and the interpretation which they place upon the contract.

379 The Court instructs the jury that the plaintiff in this case seeks to recover for payment of merchandise shipped pursuant to the agreement of October 19, 1950, and the extension agreement of July 22, 1952; that in order to entitle it to recover, it must be shown by the plaintiff by a preponderance of the evidence that it has fully and completely carried out and performed all of its obligations in said agreements.

380 The Court instructs the jury that if one party to a contract breaches the contract, the contract cannot be reinstated unless both parties agree to such reinstatement.

381 The Court instructs the jury that if one party to a contract breaches the contract by failure or refusal to perform, the other party is excused from further performance.

382 The Court instructs the jury that the measure of damages for breach of contract is the amount which will compensate the injured party for the loss which performance of the contract would have avoided.

383 The Court instructs the jury that if you find from a preponderance of the evidence that the defendant is entitled to recover on his counterclaim for breach of contract, recovery may be had for prospective profits, where there are any standards by which profits can be estimated with reasonable certainty.

384 The Court instructs the jury that if the jury believes, from a preponderance of the evidence, that plaintiff's attempted cancellation of its contractual arrangements with defendant was never excused by defendant, the jury must find for the defendant on his counterclaim for breach of contract.

385 The Court instructs the jury that if the jury believes, from a preponderance of the evidence, that plaintiff's attempt to withdraw its notice of cancellation of its contractual arrangements with defendant was never approved by defendant, the jury must find for the defendant on his counterclaim for breach of contract.

386 The Court instructs the jury that if the jury believes, from a preponderance of the evidence, that the defendant conditioned his approval of renewed operations under the contract of October 19, 1950, as extended by the agreement of July 22, 1952, upon the giving of guarantees or assurances by plaintiff or any other person or firm and that such guarantees or assurances were never, in fact, given, then the jury must find for the defendant on his counterclaim for breach of contract.

387 The Court instructs the jury that if the jury believes, from a preponderance of the evidence, that plaintiff breached its contract with defendant for the breading of shrimp, plaintiff is liable to defendant for damages for breach of such contract, which damages shall be measured by the loss of profits which defendant would have realized if the contract were to have been performed.

388 The Court instructs the jury that an oral contract which is proved by a preponderance of the evidence is fully as valid and binding as a written contract.

389 The Court instructs the jury that if the jury believes, from a preponderance of the evidence, that

plaintiff shipped shrimp of poor quality or in a damaged state, plaintiff is liable to defendant for any loss of sales, customers and good will sustained by the defendant because of such poor quality.

390 The Court instructs the jury that if the jury believes, from a preponderance of the evidence, that plaintiff refused or failed to deliver shrimp in accordance with the terms of its contract with defendant, plaintiff is liable for damages occasioned by its non-performance or failure to deliver the said shrimp.

391 The Court instructs the jury that no interest shall be computed, in ascertaining damages, on any amounts of money not due and owing one party by the other.

392 The Court instructs the jury that if the jury believes, from a preponderance of the evidence, that plaintiff breached its contract of October 19, 1950, as extended on July 22, 1952, and that the defendant attempted to take steps to lessen the loss or damage, if any, suffered by him, and that as a result of such steps he suffered additional damages and losses, you will find plaintiff liable for such additional damages and losses.

393 The Court instructs the jury to sign one, and only one of the following three forms of verdict:

If you find for the plaintiff on the complaint and you find for the defendant on the counterclaims, you will sign this verdict: "We, the jury, find the defendant guilty on the complaint and assess the plaintiff's damages at the sum of _____ dollars and we find the plaintiff guilty on the counterclaims, and assess the defendant's damages at the sum of _____ dollars."

If you find for the defendant on the complaint and you find for the defendant on the counterclaims, you will sign this verdict: "We, the jury, find the defendant not guilty on the complaint and we find the plaintiff guilty on the counterclaims and assess the defendant's damages at the sum of _____ dollars."

If you find for the plaintiff on the complaint and you find for the plaintiff on the counterclaims, you will sign this verdict: "We, the jury, find the defendant guilty on the complaint and assess the plaintiff's damages at the sum of _____ dollars and we find the plaintiff not guilty on the counterclaims."

394 The Court instructs the jury that the contracts between the parties dated October 19, 1950, and July 22,

1952, were, by their terms, to continue to exist until August 15, 1954.

395 The Court instructs the jury that the telegram of February 25, 1953, from the plaintiff to the defendant stating that the plaintiff wished to cancel the contract between the parties constituted an anticipatory breach and repudiation of the contract by the plaintiff.

396 The Court instructs the jury that the telegram of February 25, 1953, from the plaintiff to the defendant stating that the plaintiff wished to cancel the contract between the parties constituted an actual breach of the contract by the plaintiff commencing on August 15, 1953.

397 The Court instructs the jury that if you find from a preponderance of the evidence that the plaintiff did reinstate the contract between the parties but you also find from a preponderance of the evidence that such reinstatement was not made with a good faith intent on the part of the plaintiff to perform the contract, then you must find for the defendant on his counterclaim for breach of contract.

398 The Court instructs the jury that if you believe from a preponderance of the evidence that plaintiff refused or failed to deliver shrimp in accordance with the terms of its contract with defendant, plaintiff is liable to defendant for loss of customers and good will sustained by the defendant.

399 The Court instructs the jury that if you find from a preponderance of the evidence that the plaintiff did reinstate the contract between the parties but you also find from a preponderance of the evidence that the plaintiff because of other obligations was unable to perform the contract, then you must find for the defendant on his counterclaim for breach of contract.

400 The Court instructs the jury that if you find from a preponderance of the evidence that the plaintiff breached the contract of October 19, 1950, as extended by the agreement of July 22, 1952, and also breached the contract relating to the breading of shrimp, you may award the defendant damages to compensate him for the losses which performance of both contracts would have avoided.

401 The Court instructs the jury that if you find from a preponderance of the evidence that the plaintiff did reinstate the contract and you also find from a preponderance of the evidence that the defendant paid the plaintiff with the plaintiff's consent for each carload of shrimp only

after each car was sold out, then you must find that the defendant was fully performing the contract up to October 20, 1953, and that the plaintiff breached the contract on October 20, 1953.

402 And afterwards on, to wit, the 17th day of June, 1955 there was filed in the Clerk's office of said Court certain Interrogatories to Jury in words and figures following, to wit:

403 "IN THE UNITED STATES DISTRICT COURT.

* * (Caption—53-C-2482) * *

INTERROGATORIES TO JURY.

No. 1.

What sum, if any, including interest if any, expressed in dollars, do you find should be credited the plaintiff, by the defendant, for the quantity of shrimp delivered to the defendant by the plaintiff up to August 15, 1953?

$219,962.27

No. 2.

Do you find from the preponderance of the evidence that the plaintiff breached its contract with the defendant?

Yes ☐

No ☐

No. 3.

If your answer to Interrogatory No. 2 is "yes" then what is the amount of damages, if any, that you find due the defendant as a direct result of plaintiff's breach?

$

Foreman

404 And on the same day, to wit, on the 17th day of June, 1955, being one of the days of the regular June 1955 term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William J. Campbell District Judge, appears the following entry, to wit:

405 IN THE UNITED STATES DISTRICT COURT.

(Caption—53-C-2482)

This cause coming on for the return of the Jury's verdict again come the parties by their counsel and the Marshal in charge of the Jury reports that no verdict was returned by 10:00 o'clock P.M. of June 15, 1955 and that the Jury was discharged at that hour whereupon the Court directs that the Jury's incomplete verdict shall be filed herein. The plaintiff by its counsel enters herein its motion for judgment on the verdict and renews its motion for a directed verdict at the close of all the evidence and it is

Ordered that the plaintiff's brief and argument in support thereof shall be filed within ten days from this date, that the defendant's brief and argument shall be filed twenty days thereafter and that the reply brief shall be filed ten days thereafter and that leave be and hereby is granted to the defendant to argue his motion for a directed verdict at the close of all the evidence in said brief and it is

Further Ordered that leave be and hereby is granted to counsel to submit affidavits and counter-affidavits.

406 And afterwards on, to wit, the 27th day of June, 1955 came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Brief of Plaintiff In Support of Its Motion For A Directed Verdict On The Complaint etc., portions of which, viz: Affidavits of Clifford J. Hand; Glen P. Thompson et al., and Elizabeth H. Burno, et al., are in words and figures following, to wit:

407 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—53-C-2482) * *

AFFIDAVIT.

State of Illinois, }
County of Cook } ss:

Clifford J. Hand, being first duly sworn on oath, deposes and says that:

1. I was selected as a member of the jury in the above entitled proceeding.

2. On Wednesday, June 15, 1955, at about 11:30 A.M., after being instructed by the Judge, the other members of the jury and I retired to the jury room to commence our deliberations.

3. By a unanimous oral vote of the other jurors I was elected foreman.

4. Deliberation then began on Interrogatory No. 1 of the three Interrogatories addressed to the jury. Early in the afternoon of June 15, 1955, and after deliberation
408 and consideration of certain of the plaintiff's and defendant's exhibits, the jury, by unanimous vote, decided upon the answer to Interrogatory No. 1, to-wit: $219,962.27.

5. Following this unanimous vote by the jury I entered the sum of $219,962.27 in the space provided for the jury's answer to Interrogatory No. 1.

6. Then the jury began deliberating upon Interrogatory No. 2. However, no unanimous decision was ever reached with respect to this Interrogatory.

7. After the jury's answer to Interrogatory No. 1 was recorded by myself, the jury never reconsidered said answer and nobody asked that it be reconsidered. Our entire deliberations thereafter were directed toward an attempt to answer Interrogatory No. 2.

8. At approximately 10:00 P.M. a court attache, in charge of the jury, entered the jury room and announced that there had been a mistrial. He then informed the jury that there had been a time limit set upon our deliberations. This same court attache then gathered up the exhibits of plaintiff and defendant, the court's instructions to the jury, and the copy of the three Interrogatories addressed to the jury on which I had recorded the jury's answer to Interrogatory No. 1.

9. After recording the jury's answer to Interrogatory No. 1 I did not sign the Interrogatory because it was my understanding that the Interrogatories were not to be signed unless the jury answered at least Interrogatories numbered 1 and 2.

10. Further, this affidavit is given voluntarily, without any inducement whatsoever, and solely to aid in the orderly disposition of this case.

Clifford J. Hand.

Subscribed and sworn to before me this 20th day of June, 1955.

William C. Brooks.

(Seal) *Notary Public.*

409 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—53-C-2482) * *

AFFIDAVIT.

State of Illinois, } ss:
County of Cook. }

Glen P. Thompson and Frances Grodinsky, being first duly sworn on oath depose and say that:

1. We were selected as members of the jury in the above entitled proceeding.

2. On Wednesday, June 15, 1955, at about 11:30 A.M., after being instructed by the Judge, we and the other members of the jury retired to the jury room to commence our deliberations.

3. By a unanimous oral vote Mr. Clifford J. Hand was elected Foreman.

4. Deliberation then began on Interrogatory No. 1 of the three Interrogatories addressed to the jury. Early in the afternoon of June 15, 1955, and after deliberation

and consideration of certain of the plaintiff's and de-
410 fendant's exhibits, the jury, by unanimous vote, decided upon the answer to Interrogatory No. 1.

5. Following this unanimous vote by the jury Mr. Clifford J. Hand, the Foreman, recorded the jury's answer in the space provided for such answer to Interrogatory No. 1.

6. Then the jury began deliberating upon Interrogatory No. 2. However, no unanimous decision was ever reached with respect to this Interrogatory.

7. After the jury's answer to Interrogatory No. 1 had been recorded by the Foreman, we did not sign the Interrogatory because it was our understanding that the Interrogatories were not to be signed unless the jury answered at least Interrogatories numbered 1 and 2.

8. Further, this affidavit is given voluntarily, without any inducement whatsoever, and solely to aid the orderly disposition of this case.

Glen V. Thompson

Subscribed and sworn to before me this 20th day of June, 1955.

William C. Brooks,
Notary Public.

(Seal)

Frances Grodinsky

Subscribed and sworn to before me this 20th day of June, 1955.

William C. Brooks,
Notary Public.

(Seal)

411 IN THE UNITED STATES DISTRICT COURT.
(Caption—53 C 2482)

AFFIDAVIT.

State of Illinois, } ss:
County of Cook. }

Elizabeth H. Burno, Erna M. Erikson, Marshall E. Alsborg, Bernice S. Fritsch, Dolores E. Triebull, Adrienne A. Fotre, Joseph B. Czarnecki, John R. Coole and Vivienne L. Hedges, being first duly sworn on oath depose and say that:

1. We were selected as members of the jury in the above entitled proceeding.

2. On Wednesday, June 15, 1955, at about 11:30 A. M., after being instructed by the Judge, we and the other members of the jury retired to the jury room to commence our deliberations.

3. By a unanimous oral vote Mr. Clifford J. Hand was elected Foreman.

4. Deliberation then began on Interrogatory No. 1 of the three Interrogatories addressed to the jury. Early in the afternoon of June 15, 1955, and after delibera-
412 tion and consideration of certain of the plaintiff's and defendant's exhibits, the jury, by unanimous vote, decided upon the answer to Interrogatory No. 1.

5. Following this unanimous vote by the jury Mr. Clifford J. Hand, the Foreman, recorded the jury's answer in the space provided for such answer to Interrogatory No. 1.

6. Then the jury began deliberating upon Interrogatory No. 2. However, no unanimous decision was ever reached with respect to this Interrogatory.

7. After the jury's answer to Interrogatory No. 1 had been recorded by the Foreman, we did not sign the Interrogatory because it was our understanding that the Interrogatories were not to be signed unless the jury answered at least Interrogatories numbered 1 and 2.

8. Further this affidavit is given voluntarily, without any inducement whatsoever, and solely to aid the orderly disposition of this case.

Elizabeth H. Burno

Subscribed and sworn to before me this 20th day of June, 1955.

William C. Brooks,
(Seal) *Notary Public.*

Vivienne L. Hedges

Subscribed and sworn to before me this 20th day of June, 1955.

William C. Brooks,
(Seal) *Notary Public.*

Dolores E. Triebull

Subscribed and sworn to before me this 20th day of June, 1955.

William C. Brooks,
(Seal) *Notary Public.*
413

Marshall Alsborg

Subscribed and sworn to before me this 20th day of June, 1955.

William C. Brooks,
(Seal) *Notary Public.*

Bernice S. Fritsch

Subscribed and sworn to before me this 20th day of June, 1955.

William C. Brooks,
(Seal) *Notary Public.*

Joseph B. Czarnecki, Sr.

Subscribed and sworn to before me this 20th day of June, 1955.

William C. Brooks,
(Seal) *Notary Public.*

John R. Coble

Subscribed and sworn to before me this 20th day of June, 1955.

William C. Brooks,
(Seal) *Notary Public.*

Erna Erickson

Subscribed and sworn to before me this 20th day of June, 1955.

William C. Brooks,
(Seal) *Notary Public.*

Adrienne A. Fotre

Subscribed and sworn to before me this 20th day of June, 1955.

William C. Brooks,
(Seal) *Notary Public.*

416 And afterwards, to wit, on the 10th day of February, 1956, being one of the days of the regular February term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William J. Campbell, District Judge, appears the following entry, to wit:

417 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—53-C-2482) * *

MEMORANDUM, FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT.

Campbell, District Judge.

The plaintiff, hereinafter occasionally referred to by its trade name, "Reno", is a Mexican corporation engaged in the business of purchasing, freezing and packing shrimp. Reno produces about an eighth of the total production of West Coast of Mexico shrimp. The defendant is a resident of Illinois and is engaged in the business of distributing shrimp in the United States and the Dominion of Canada. The case was tried before the Court and a jury on the plaintiff's complaint and the defendant's amended counterclaim; the jury having failed to return a verdict, all motions were ordered briefed and the case was taken under advisement.

418 On October 19, 1950, plaintiff and defendant entered into a written contract (P's Ex. 1) whereby plaintiff was to deliver to the defendant, for sale by the defendant, at least 90% of the plaintiff's total production of shrimp caught or purchased, packed and frozen by the plaintiff from the date of the execution of the contract up to August 15, 1951. The defendant agreed to distribute no Mexican shrimp other than the plaintiff's shrimp. By terms of the above contract, the defendant was to establish a letter of credit simultaneously with notification by the plaintiff that it was prepared to ship a carload of shrimp. Each letter of credit was to cover 75% of the market value of the carload of shrimp thus delivered. The defendant was to remit to the plaintiff 93% of the price at which the shrimp was sold by the defendant, after deducting therefrom all expenses paid or incurred by the

defendant in connection with the transportation of shrimp from the plaintiff to the defendant. Under clause 11 (b) of the contract, the defendant was to deliver to the plaintiff, on or before the fifteenth day of each month, a report in writing stating 1) the names and addresses of the defendant's customers, 2) the dates on which sales were made, 3) the sale price at which the shrimp were sold, and 4) other information regarding the identification of the shrimp thus sold by the defendant. Simul-
419 taneously with the delivery of each such report, the defendant agreed to pay to the plaintiff the balance due from the defendant on all sales made by the defendant "as disclosed by such report." Under clause 18, the contract would expire on August 15, 1951 and on August 15th of each succeeding year thereafter if the contract was renewed. Under this clause, the contract was to be automatically renewed for another year unless either party notified the other to the contrary by March 1st of each year.

The parties continued under amicable business relations until July 22, 1952 when they executed a so-called extension agreement. (P's Ex. 3) This agreement modified the prior contract to the extent that the October 19, 1950 contract (P's Ex. 1) was extended for a term of two years and the plaintiff was given its option whether the defendant was to furnish letters of credit or not. If the defendant furnished letters of credit, the defendant would continue to remit 93% of the price at which the defendant sold the shrimp; otherwise, the defendant was to remit 95%. The agreement provided that, with these exceptions, the terms of the prior contract would continue in effect.

After this agreement was executed, the parties again continued on amicable terms until February 25, 1953. On this date, plaintiff sent the defendant a telegram (P's Ex. 4) wherein the plaintiff stated that it was the
420 plaintiff's will to terminate the October 1950 contract. (P's Ex. 1) This telegram continued by stating, in substance, that the October 19, 1950 contract (P's Ex. 1), by its terms, will thus end on August 15, 1953.

The defendant was quick to reply to this telegram, stating that the "July 22, 1952 contract is not subject to cancellation until 1954". (P's Ex. 5)

After this telegram followed a series of exchanges of telegrams and letters, the plaintiff insisting that the contract was cancelled, the defendant insisting that the con-

tract remained in full force and effect until August 15, 1954. Notwithstanding the notice of termination for the 1953-1954 season, the plaintiff continued to fulfill its obligations for the 1952-1953 season. Beginning in October 1952 and ending in June 1953, cars 31 through 38 were shipped to the defendant. The defendant has not, as yet, paid the plaintiff for these shipments, and it is for payment of these shrimp that the plaintiff brings the instant action.

Immediately after notice of its termination, the plaintiff, through its general manager, Pedro L. Pinson, began negotiations for the formation of a new method of distribution of its shrimp. The plaintiff was instrumental in forming a new Mexican organization called Exportadores Associados. Exportadores Associados (hereinafter referred
421 to as E.A.) consisted of five West Coast of Mexico shrimp producers whose combined production amounted to approximately one fourth of the total production of West Coast of Mexico shrimp. These producers, including the plaintiff, were stockholders in E.A. E.A., in turn, caused an American corporation to be formed, Crest Importing Company, of San Diego, California. Crest was thus formed in June 1953 and was owned entirely by E.A. On October 3, 1953, a contract was executed between E.A. and Crest whereby E.A. was to sell, and Crest was to purchase, all of E.A.'s production of shrimp. The producers who comprised the stockholders of E.A., with the exception of the plaintiff, had previously agreed to sell their entire production to E.A. which, of course, was then obligated to sell to Crest. There is no competent evidence in the record which reflects that the plaintiff, at any time before the instant controversy, entered into any contract, or became otherwise bound, to sell its production to either E.A. or Crest. Likewise, there is no competent evidence that the plaintiff was a party to the contract which had been executed between Crest and E.A.

During the exchange of telegrams and letters between the parties concerning whether the contract was terminated or not, the plaintiff's son, Mr. Robert Appelbaum, and then the plaintiff himself went down to Mexico in an
422 attempt to persuade the plaintiff into continuing to perform its contract with the defendant. Nothing of legal consequence occurred during these visits as the plaintiff continued to insist that the contract was legally

terminated and the defendant continued to hold that it was not. In the meantime, the plaintiff had begun to attempt to persuade the defendant into taking a sub-brokerage through Crest.

The relationship between the parties remained in this status until August 28, 1953. At this time, the defendant sent the plaintiff a telegram (P's Ex. 11) stating that he did not intend to continue a pointless exchange of telegrams and demanding that the plaintiff send an authorized representative to Chicago in order that an amicable solution might be reached.

On September 24, 1953, two conferences were held at Chicago, Illinois. Present at these meetings were the defendant, Henry Appelbaum, his son Robert, the defendant's attorney, Stanford Clinton, John Willis, president of Crest, Oscar Fraastro, chairman of Reno's board of directors and general comptroller of Nacional Financiera, and Monroe Collenburg, attorney representing Reno and Nacional Financiera. Nacional Financiera is an agency of the Mexican government and owns 75% of the plaintiff's capital stock. The function and purpose of Nacional Financiera is quite similar to that of the R. F. C. in the United States.

At these conferences, the defendant was offered three alternative settlements under which his contract with Reno might thus be amicably terminated. These offers were rejected by the defendant who made counter-offers which were likewise rejected by Reno. Mr. Collenburg testified that at the end of the second conference he asked the defendant whether it was his, the defendant's, position that the contract with Reno had another year to go and, if so, whether he, the defendant, was ready to perform. Collenburg testified that he then asked the defendant whether this was true and whether it was the defendant's position that the plaintiff should perform the contract for the remaining year. Collenburg testified that the defendant replied, "Yes. That is it, exactly".

The relationship between the parties remained in this position until October 3, 1953. On this date, the plaintiff sent the defendant a telegram and confirmation letter (P's Ex. 12) which stated that the plaintiff's board of directors had confirmed the extension letter agreement (P's Ex. 3) of July 22, 1952 and that, therefore, the contract between the parties remained in full force and effect. The telegram also demanded payment on or before Octo-

ber 7, 1953 of all sums due the plaintiff as a result of previous shipments of shrimp to the defendant during the preceding year. The telegram further informed
424 the defendant that the plaintiff anticipated shipping the first car of shrimp around October 9th and instructed the defendant to open a letter of credit to cover it. The confirmation letter further asserted that the plaintiff was awaiting payment as requested and informed the defendant that the plaintiff had suffered grave damage as a result of defendant's failing to make payment. The confirmation letter concluded by stating that any further delay in making payment as requested might result in the plaintiff's financial failure.

To this communication, the defendant replied with a telegram dated October 6, 1953. (P's Ex. 13.) This telegram stated that the defendant was gratified to have the plaintiff acknowledge its responsibility under the contract and indicate its intention to perform. The defendant further stated that in light of his recent experiences with the plaintiff he was entitled to adequate security for the plaintiff's performance. The telegram further stated that the defendant was puzzled at plaintiff's direction to open only one letter of credit when the plaintiff had previously requested five or more at the opening of the season.

The plaintiff replied to the defendant's telegram of October 6th (P's Ex. 13) with its telegram of October 7, 1953 (P's Ex. 14). This telegram stated that the par-
425 ties' commercial relations were renewed under the original contract and extension, noting that the defendant's October 6th telegram omitted confirmation that the defendant had made the required payment as per the plaintiff's previous telegram. The telegram concluded with the warning that plaintiff categorically demanded payment by the defendant.

The defendant answered this telegram with another telegram dated October 8, 1953. (P's Ex. 15) In this telegram, the defendant stated that he would continue to remit for cars as they were "completely sold out in accordance with past practice so long as" the plaintiff lived up to its agreement.

On October 20, 1953, the plaintiff sent the defendant its telegram (P's Ex. 16) replying to the defendant's telegram of October 8th. (P's Ex. 15) In this telegram, the plaintiff stated that it considered defendant's failure to make payment as requested in plaintiff's telegram of October

3rd (P's Ex. 12), a most serious breach of contract. The telegram went on to state that because of defendant's breach, the plaintiff refused to send the defendant any more shrimp. The defendant was then directed to make payment as directed to the First National Bank of Chicago and deposit also with the bank all warehouse receipts covering plaintiff's shrimp that the defendant had not, as yet, sold.

This line of correspondence between the parties ended with defendant's telegram of October 21, 1953. (D's Ex. 3) In this telegram, the defendant stated that he was not at all surprised with the notice contained in plaintiff's telegram of October 20th. (P's Ex. 16) The defendant stated that he placed no reliance on plaintiff's promises since, in the defendant's opinion, the plaintiff's conduct since February 25, 1953 proved that it, the plaintiff, desired to evade its obligations under the contract.

Following this last correspondence, all negotiations between the parties broke down. The plaintiff has filed this suit seeking payment by the defendant for cars 31 through 38 which were shipped to the defendant during the 1952-1953 season. Defendant has filed his amended counterclaim, alleging that the plaintiff violated the contract with the result that the defendant suffered damages well in excess of the amount of plaintiff's claim.

It should, at the outset, be observed, that defendant's failure to make payment as directed, in the absence of a justifying cause, amounted to a breach of contract excusing the plaintiff from its duty of immediate performance. Payment for the cars shipped during the previous season in the absence of legal justification, was a condition precedent to the plaintiff's duty to perform for the following season. However, the defendant cites, in substance, two grounds in support of his position that he was legally justified in not making payment to the plaintiff as directed.

First, he contends that the plaintiff's anticipatory breach of February 25, 1953 (P's Ex. 4) ripened into an actual breach on August 15, 1953. Secondly, defendant argues that there was no immediate duty on his part to make payment to the plaintiff when this payment was requested. Each ground on which the defendant relies is particularized herein as each is considered. If it is determined that the defendant, and not the plaintiff, breached the instant contract, then it will be unnecessary for the Court to consider the merits of the amended counterclaim.

since if it is held that the defenses asserted are not tenable, then the amended counterclaim must of necessity fail also because the amended counterclaim relies on legal contentions asserted in defense to and recoupment against the plaintiff's complaint.

First Defense.

It is, of course, true that plaintiff's telegram of February 25, 1953 (P's Ex. 4) amounted to an anticipatory breach of contract. This anticipatory breach could have been effectively withdrawn at any time prior to the due date of the repudiator's performance if, in the interim, the injured party has not brought an action on the anticipatory breach or has not otherwise materially changed his position. *Alvey-Ferguson Co.* v. *Ernst Tosetti Brewing Co.*, 178 Ill. App. 536; Restatement of Contracts, Sections 312, 318, and 319. The record being void of any such evidence of estoppel, the due date of the plaintiff's performance must be determined since a withdrawal of the anticipa-
428 tory breach prior to that date would nullify its effect as a breach.

The defendant apparently contends that the due date for the plaintiff's performance was August 15, 1953. Defendant argues that the plaintiff's anticipatory breach was subject to withdrawal at any time prior to August 15th, at which time, in the absence of such withdrawal, the anticipatory breach ripened into an actual breach of contract. The defendant's position, in this regard, is untenable for two reasons. First of all, the evidence in this case clearly reveals that the Mexican shrimp season runs from October to July of the following year. During the course of the parties' business relationship, the plaintiff at no time shipped the defendant any shrimp prior to October. The plaintiff would begin to ship shrimp in October and the last shipment would be sent in June or July of the following year. It is clear, therefore, that the crucial date was not August 15, 1953 as counsel for the defendant suggest. The anticipatory breach was subject to withdrawal at any time prior to the due date of the plaintiff's performance, which, in the present case, was any time during the month of October, 1953, depending on when the Mexican shrimp season actually started. Secondly, the provision in the original contract (P's Ex. 1) regarding contract years was expressly superseded by the terms of the extension agree-

ment. (P's Ex. 3) The original contract between the parties (P's Ex. 1), as contained in clause 18 of that contract, provided for a contract term of one year
429 expiring on August 15, 1951. If renewed, the contract as renewed would end on the following August 15th. However, the extension agreement (P's Ex. 3) did away with the one year term of contract and provided for a two year term instead. The extension agreement expressly extended the contract term for a period of two years. Thus, the contract was extended for two years from August 16, 1952 to August 15, 1954. The one year clause contemplating the contract's termination on August 15th of each year was superseded by a two year period ending on August 15, 1954. Accordingly, the significance of the date of August 15, 1953 was lost when the extension agreement was executed. I conclude, therefore, that the date of August 15, 1953 was a date of no legal consequence.

Counsel for the defendant argue that even the plaintiff believed August 15, 1953 to be the crucial date. Counsel cite the plaintiff's notice of termination (P's Ex. 4) which states that the contract will end on August 15, 1953. The difficulty with this argument is that the plaintiff believed it had a legal right to terminate the contract on August 15, 1953. The evidence however, shows that the plaintiff was in error and was finally persuaded that the contract could not be legally terminated until August 15, 1954. The defendant cannot lift himself by what obviously was an erroneous assumption on the plaintiff's part.

430 Having thus determined that the plaintiff's anticipatory breach (P's Ex. 4) could be effectively withdrawn before plaintiff's duty of immediate performance arose (said performance being due sometime in October 1953), I hold, as a matter of law, that plaintiff's notice of October 3, 1953 (P's Ex. 12) was an effective withdrawal of plaintiff's anticipatory breach of February 25, 1953. (P's Ex. 4) The contract having been restored to full effect and vitality, it was then incumbent upon the defendant to perform his part of the contract.

Notwithstanding the notice of intent to perform (P's Ex. 12), counsel for the defendant argue that the plaintiff's acts were such that it was impossible or apparently impossible for the plaintiff to perform its contract with the defendant. Counsel argue that Reno was legally obligated to sell its shrimp to E.A. or C'rest for the 1953-1954 season and that the plaintiff, therefore, could not fulfill its obliga-

tions to the defendant. The short answer to this contention is that the record is completely void of any competent evidence proving, or tending to prove, that Reno became bound, by written contract or otherwise, to sell its production to either E.A. or Crest. The evidence merely shows that the plaintiff's plans for E.A. and Crest were of the long range variety, contemplating this system of distribution after the contract with the defendant had terminated. The defendant's argument, therefore, is totally without merit.

431 Second Defense.

The defendant next contends that he was under no duty to pay the plaintiff on October 3, 1953 because, the defendant argues, payment for each car of shrimp was due only after that car had been completely sold out and on October 3, 1953, the cars being presently sued for by the plaintiff had not, as yet, been completely sold out. In this regard, counsel for the defendant rely on the defendant's testimony to the effect that it was his practice to pay for each car as it was completely sold out. However, I find defendant's testimony to be of no value in view of his statements in a letter to the plaintiff dated August 6, 1953. (P's Ex. 21) In this letter, the defendant, in speaking of the July 22, 1952 extension agreement (P's Ex. 4), stated:

> "* * * While the understanding was that we would pay the bank when we were paid, there was not one car out of 30 that was not paid long before we received our money for it and long before the due date. Moreover, if you will check your records, I sincerely doubt if you will find more than a few cases where we failed to pay the bank for any car before it was completely sold out."

Such statements, contained in a letter so contemporary with the parties' disagreement, compel this Court to find, as a matter of law, that the defendant's testimony in this regard is entitled to no weight whatsoever. This is particularly so because counsel have failed to explain the obvious inconsistency between the defendant's testimony and his prior written statements.

432 Counsel also rely on testimony elicited on cross-examination, from Pedro L. Pinson in order to prove the suggested practice of payment. However, this proof is

faulty for two reasons. First of all, a review of the record clearly reveals that the witness Pinson was entirely confused when asked questions concerning the practice of payment. He stated that he did not know what the word "practice" meant. When asked whether the practice from the date of the extension agreement was to pay for cars as they were completely sold out. Pinson testified that he didn't remember. (Tr. 181) Counsel for the defendant then rephrased the same question, employing terminology that at best was not too clear. To this question, which also contained a condition for instances where advances were made to the plaintiff, Pinson answered "yes". Thus, when viewed from this position, I believe the admission elicited from Pinson is entitled to little, if any, consideration. Pinson's testimony, taken as a whole, clearly indicates that he meant that it was defendant's practice to pay for each car "as it was sold" as distinguished from "as it was completely sold out". Secondly, if it was counsel for the defendant's intention to prove a practice of making payment then it was incumbent on the defendant to prove this by direct testimony in his case in chief and not by admissions on cross-examination during the plaintiff's case.

Evidence elicited on cross-examination is not substantive evidence and cannot be used to prove an issue which must be proved with direct testimony by the party asserting it.

Clause 11(b) of the original contract (P's Ex. 1) provided that the defendant should submit a monthly report to the plaintiff. This clause also provided that simultaneously with this report, the defendant was to pay the plaintiff for the balance due on all sales as declared by such report. The extension agreement (P's Ex. 3) merely allowed for the contingency that the defendant, at the plaintiff's option, need not open letters of credit, in which case the amount remitted to the plaintiff would be 95% rather than 93% of the defendant's sale price. The extension agreement expressly stated that all other provisions of the original contract (P's Ex. 1) would remain in full force and effect. Clearly, therefore, by the unambiguous terms of the written contract, the defendant was obligated to pay the plaintiff for all shrimp which the monthly report had revealed were sold during the preceding month. The defendant, having failed to do this for many months, the plaintiff was entitled to refuse to further perform its part of the contract.

However, even assuming, for purposes of argument, that the practice was to pay the plaintiff as the cars were completely sold out, the plaintiff, on adequate notice, had the right to insist that all payments were to be according to the strict terms of the contract. Thus, the plaintiff
434 notified the defendant, in its telegrams of October 3, 1953 (P's Ex. 12) and October 7, 1953 (P's Ex. 14) that payment for the shrimp that had been sold was an absolute necessity. The defendant was thus warned that payment was of the essence. Knowing that the plaintiff had previously desired to terminate the contract, and knowing that the plaintiff was then persuaded, by competent American counsel, to fulfill its contractual obligations and had retracted its repudiation, it was incumbent on the defendant to punctiliously perform the contract on his part by making payment so as to give the plaintiff no cause to legally terminate the contract.

Thus, in *Roehm* v. *Horst*, 178 U. S. 1, the Supreme Court said, at page 11:

> "The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non performance; but in that case, he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party, not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it."

In the present case, the evidence is clear and convincing that the defendant refused to pay not because of any vague practice of paying but because he wanted adequate
435 security that the plaintiff would continue to perform its contract. The defendant, clearly, withheld funds in order to hold this club over the plaintiff's head in case it refused to perform. Adopting such a plan, the defendant embarked on a rather hazardous course for the protection of his rights. Having withheld funds legally owed the plaintiff, the payment of which being a condition precedent to the plaintiff's duty of immediate performance, the defendant thus breached his contract with the plaintiff entitling the plaintiff to legally terminate the contract.

Counsel for the defendant argue that the defendant was legally justified in desiring security for the plaintiff's continued performance. Counsel assert, and have offered some evidence of oral admissions by third parties, that in Mexico a contract "does not mean anything." It is argued that if the plaintiff breached the contract, the defendant would be left with a bare right that could not be asserted in a court of competent stature. However, this Court cannot assume that the Republic of Mexico is not a civilized nation where foreigners cannot secure redress of their grievances as well as can persons native to that country. I must assume, in the absence of competent evidence to the contrary, that a written contract in Mexico enjoys all the sanctity and attendant rights as it does in this country. If the defendant contends otherwise, then he must prove his position by competent evidence and not by testi-
436 mony of what third parties have asserted concerning the dignity of a contract in Mexico. Furthermore, when the defendant entered into this contract with the plaintiff, he assumed the risk that, if the plaintiff breached the contract, he could not assert his right to be compensated for the wrong thus done him.

I hold, therefore, as a matter of law, that the defendant's refusal to make payment to the plaintiff as directed was a breach of contract, entitling the plaintiff to legally terminate the contract and bring the present action. Having made such a determination, I hold that the defendant's amended counterclaim is totally without merit, since the defendant, and not the plaintiff, breached the contract in issue. *Hess Co.* v. *Dawson*, 149 Ill. 138; *Chicago Washed Coal* v. *Whitsett*, 278 Ill. 623. The issues involved being manifestly issues of law, the plaintiff's motion for a directed verdict, on the complaint and amended counterclaim, should be granted.

It must now be determined the amount of damages to be awarded. The evidence reveals that the defendant is indebted to the plaintiff for eight carloads of shrimp, numbered 31 through 38, inclusive, which were shipped to the defendant during the period from October, 1952 through June, 1953. According to a document (P's Ex. 17) sub-
mitted by Mr. Sprecher, defendant's counsel, to Mr.
437 Kohn, plaintiff's counsel, the amount due the plaintiff for cars 31 through 38 was stated by Mr. Sprecher to be $198,153.81. Mr. Olson, a certified public accountant, testified that after reviewing the defendant's books and

records, he discovered a mathematical error, in the defendant's favor, of $1000 in the Sprecher memorandum. (P's Ex. 17; Tr. 46) Adding this $1000 to the sum reflected by the Sprecher memorandum, the amount due the plaintiff was raised to $199,153.81. Olson then testified that an additional commission of $315.72 was due the defendant on sales from cars 29 and 30 and that this amount, when subtracted from the sum of $199,153.81, left the total principal amount due the plaintiff at $198,838.09. (Tr. 46)

There are, however, several items that had been deducted by the defendant, and thus charged to the plaintiff, which the evidence clearly reveals are improper deductions to which the defendant, therefore is not entitled. In the Sprecher memorandum (P's Ex. 17), the defendant claimed a deduction of $4,816.56 for certain breading items which the defendant alleged were chargeable to the plaintiff under an alleged oral contract for breading shrimp, said contract having been set up in the defendant's amended counterclaim. The Court, however, ruled that the action on the oral contract was barred by the Statute of Frauds; therefore, any breading deductions are improper. Thus, the sum of $4,816.56 must be held to be an improper de-
438 duction. (Tr. 49-51) The evidence also reveals that the plaintiff is entitled to an additional $1,136.78, which represents an amount charged the plaintiff for storage and handling in excess of the amount actually paid by the defendant during the period from February 28, 1953 to February 28, 1954. (P's Ex. 18; Tr. 51) The plaintiff is also entitled to the sum of $2,992.96, said sum representing rebates on storage charges for the two years ending October 31, 1952. (P's Ex. 18; Tr. 52) Robert Appelbaum, who is in charge of the defendant's books and records, testified that the sums of $1,136.78 and $2,992.96 were funds either refunded to, or not actually paid by, the defendant. (Tr. 581, 582) These sums were clearly improper deductions because clause 11 (b) II of the original contract (P's Ex. 1) provided that only deductions for items actually spent could be chargeable against the proceeds of sales. I hold, therefore, that these three deductions, amounting to $8,946.30, were clearly improper deductions to which the defendant is not entitled.

There are, however, in addition to these deductions which were clearly improper, two items for which Olson, the plaintiff's expert witness, would find no supporting evi-

dence in his examination of the defendant's books and records. (Tr. 53, 54) These items are (1) an adjustment for $1,350 on truck insurance charged the plaintiff and (2) an adjustment for $1,743.90 on storage and handling.

439 As to the $1,350 truck insurance item, the defendant's letters of August 6, 1953 and May 25, 1953 (P's Ex. 21 and 28 respectively) both contain admission by the defendant that an adjustment on this item in the plaintiff's favor would be proper. Concerning the $1,743.90 storing and handling adjustment, Olson testified that he found no supporting evidence indicating whether this amount should, or should not, have been credited to the plaintiff. The defendant offered no evidence which would prove, or tend to prove, that these sums were properly deductible. The plaintiff having questioned these deductions, it was then incumbent on the defendant, having control of all the books and records, to prove the propriety of such deductions in diminution of the plaintiff's demand. 1 C. J. S. 39 (b). The defendant, having failed to sustain this burden, the offset must be disallowed and the plaintiff's claim must accordingly be increased by $3,093.90, the sum of said unexplained deductions.

In conclusion, the sum total of the principal, clearly improper deductions, and unexplained deductions amounts to $210,878.29. This sum represents the total amount due and owing the plaintiff, without interest.

In accordance with the views expressed, I therefore hold as a matter of law that the defendant, and not the plaintiff, breached the instant contract. Accordingly, the plaintiff is entitled to a judgment in its favor for $210,878.29 plus interest.

440 The plaintiff's motion for a directed verdict on the complaint, which was taken under advisement pursuant to Rule 50(b) at the conclusion of all the evidence, is hereby granted. The plaintiff's motion for a directed verdict on the amended counterclaim, which was similarly taken under advisement pursuant to Rule 50(b), is hereby also granted. Defendant's motions for a directed verdict on the plaintiff's complaint and on the defendant's amended counterclaim are hereby denied.

Insofar as they may be required, the facts described and the conclusions expressed herein shall stand as Findings of Fact and Conclusions of Law, as provided in Federal Rule 52(a).

Judgment is hereby entered for the plaintiff in the sum of $210,878.29 plus interest at 5% to June 15, 1955 the date the case was submitted to the jury, plus the costs of this litigation.

Campbell,

Judge.

February 10, 1956.

441 And afterwards, to wit, on the 17th day of February, 1956, being one of the days of the regular February term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William J. Campbell, District Judge, appears the following entries to wit:

442 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—53-C-2482) * *

ORDER COMPUTING INTEREST WITH RESPECT TO JUDGMENT ENTERED FEBRUARY 10, 1956.

This cause coming on to be heard upon the motion of plaintiff to add the amount of interest to judgment entered herein on February 10, 1956, pursuant to due and proper notice to the attorneys for the defendant, and upon the memorandum decision of the court heretofore filed herein;

It Is Hereby Ordered That the interest to be recovered by plaintiff with respect to the sum of $210,878.29, awarded plaintiff, amounts to $18,215.09 computed at the rate of 5% per annum from the various dates the items aggregating said sum became payable to June 15, 1955 when the case was submitted to jury, which amount is to be added
443 to and to be a part of the total sum awarded to plaintiff; and

It Is Therefore Further Ordered That the judgment heretofore entered on February 10, 1956 shall read as follows:

"Judgment is hereby entered for plaintiff in the sum of $210,878.29 plus interest in the amount of $18,215.09, together with plaintiff's costs."

Enter:

Campbell,

Judge.

* * * * *

451 And on the same day, to wit, the 20th day of February, 1955 came the Defendant-Appellant by his attorneys and filed in the Clerk's office of said Court his certain Notice of Appeal (Clerk's Certificate of Mailing Attached Thereto) in words and figures following, to wit:

452 IN THE UNITED STATES DISTRICT COURT

Northern District of Illinois,

Eastern Division.

Refrigeradora Del Noroeste, S. A., a Mexican corporation, *Plaintiff.* *vs.* Henry Appelbaum, doing business as Penguin Frozen Foods, *Defendant.*	Civil Action No. 53 C 2482

NOTICE OF APPEAL.

To: Mr. Louis A. Kohn,
Mayer, Friedlich, Spiess, Tierney, Brown & Platt,
Attorneys for Plaintiff,
231 South LaSalle Street,
Chicago 4, Illinois.

Notice is hereby given that Henry Appelbaum, doing business as Penguin Frozen Foods, the defendant above named, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the judgment entered for the plaintiff in the sum of $210,878.29 plus interest at 5% to June 15, 1955, plus the costs of litigation, said judgment having been entered in this action on February 10, 1956.

Robert A. Sprecher,
100 W. Monroe Street,
Chicago 3, Illinois,
RA 6-2632,
Joseph E. Clayton, Jr.,
765 East Oakwood Blvd.,
Chicago 15, Illinois,
DR 3-7200,
Attorneys for Defendant Appellant.

Dated: February 20, 1956.

453 United States of America
Northern District of Illinois } ss:

Refrigeradora Del Noroeste, S. A.,
a Mexican corporation,
vs.
Henry Appelbaum, etc. } No. 53 C 2482

CERTIFICATE OF MAILING.

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify that on February 20, 1956, in accordance with Rule 73(b) of the Federal Rules of Civil Procedure, a copy of the foregoing Notice of Appeal was mailed to:

Mayer, Friedlich, Spiess, Tierney, Brown & Platt,
231 S. La Salle St.,
Chicago 4, Illinois.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 20th day of February, 1956.

Roy H. Johnson,
Clerk.

(Seal)

By Beverly V. Peters,
Deputy Clerk.

468 And afterwards, to wit, on the 27th day of March, 1956, being one of the days of the regular March term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William J. Campbell District Judge, appears the following entry, to wit:

469 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—53 C 2482) * *

ORDER.

On motion of counsel for defendant hereto, it is

Ordered that the Clerk of this Court be and he is hereby authorized and directed to certify and transmit to the United States Court of Appeals for the Seventh Circuit in the Record on Appeal in this cause the original exhibits described in items 47 and 48 of the Designation of Contents of Record on Appeal heretofore filed by defendant.

It Is Further Ordered that the Clerk be excused from comparing the transcript of trial proceedings filed with him, with the Clerk's file copy, it appearing that both copies of the transcript are transcribed from the same steneil.

470 On motion for defendant

It Is Further Ordered that the notice, motion and affidavit for leave to file instanter amendment to amended answer and counterclaim filed June 3, 1955, together with copy of amendment to amended answer and counterclaim, which amendment was received by the Court which then denied defendant leave to file said pleading, be included as part of the record on appeal in this cause.

Enter:

Campbell,
Judge.

March 27, 1956.

* * * * *

477 United States of America
Northern District of Illinois } ss.

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with the Designation of Contents of Record on Appeal filed in this Court in the cause entitled: Refrigeradora Del Noroeste, S.A., a Mexican corporation, Plaintiff, *vs.* Henry Appelbaum, doing business as Penguin Frozen Foods, Defendant, No. 53 C 2482, as the same appear from the original records and files thereof now remaining among the records of the said Court in my office, except the exhibits which are incorporated herein originally by direction of this Court. The Transcript of Proceedings as certified by the Official Court Reporter is certified by the Clerk as part of this record without comparison with the Clerk's File Copy, pursuant to an order of this Court.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 30th day of March, 1956.

Roy H. Johnson,
Clerk.

(Seal)

By Gizella Butcher,
Deputy Clerk.

Office of the Clerk, U.S.
FILED
JAN 21 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 740

HENRY APPELBAUM, DOING BUSINESS AS PENGUIN FROZEN FOODS,
Petitioner,

vs.

REFRIGERADORA DEL NOROESTE, S. A.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

STANFORD CLINTON,
134 North La Salle Street,
Chicago 2, Illinois,

ROBERT A. SPRECHER,
FRANK A. KARABA,
100 West Monroe Street,
Chicago 3, Illinois,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. .....

HENRY APPELBAUM, DOING BUSINESS AS PENGUIN FROZEN FOODS,

Petitioner,

vs.

REFRIGERADORA DEL NOROESTE, S. A.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Henry Appelbaum, doing business as Penguin Frozen Foods, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above case on October 30, 1957, petition for rehearing denied on December 3, 1957.

OPINIONS BELOW.

The opinion of the District Court (R. 694-708) is reported at 138 F. Supp. 354. The opinion of the Court of Appeals, printed in the Appendix herein, *infra*, p. 23, is reported at 248 F. 2d 858.

JURISDICTION.

The judgment of the Court of Appeals was entered on October 30, 1957 (Appendix, *infra*, p. 31). Rehearing was denied on December 3, 1957 (Appendix, *infra*, p. 32). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

1. May a trial court, in ruling upon a motion for directed verdict after a jury has been unable to agree, completely ignore evidence elicited on cross-examination for the stated reason that such evidence "is not substantive evidence"?

2. May a trial court constitutionally deprive the petitioner of his right to trial by jury by resolving issues that depend on the credibility of witnesses and the effect or weight of conflicting evidence?

(a) Could the District Court in ruling upon the motions for directed verdicts, properly ignore admissions elicited from the chief officer of the respondent on cross-examination for the stated reason that he "was entirely confused"?

(b) Could the Court of Appeals similarly ignore the testimony of the respondent's chief officer because an ambiguous letter written by the petitioner might be construed to contradict the officer's testimony, notwithstanding that the direct testimony of the petitioner was consistent with the officer's damaging admissions?

(c) Could the District Court and Court of Appeals properly deprive the petitioner of his right to have a jury determine the good faith of the respondent's purported withdrawal of its anticipatory breach, where the record is replete with evidence of the respondent's bad faith?

3. Did the respondent's apparent impossibility of with-

drawal of its anticipatory breach constitute a total breach of contract not subject to withdrawal?

4. Was the oral contract between the petitioner and the respondent outside the Illinois Statute of Frauds for the reason that it, being concurrent with a written contract terminable upon the act of the legislature of the Republic of Mexico, could possibly be performed within a year?

CONSTITUTIONAL PROVISION INVOLVED.

The Seventh Amendment to the Constitution of the United States provides (U. S. C. A. Const., Amend. 7):

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

STATUTE INVOLVED.

The pertinent provisions of the Illinois Statute of Frauds (Ill. Rev. Stat. 1955, chap. 59, par. 1) are:

> "No action shall be brought * * * upon any agreement that is not to be performed within the space of one year from the making thereof, unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

STATEMENT.

The plaintiff, Refrigeradora del Noroeste, S. A., a Mexican corporation (hereinafter called "respondent"), brought this action against Henry Appelbaum, doing business as Penguin Frozen Foods (hereinafter called "peti-

tioner"), for sums alleged to be due for frozen shrimp delivered pursuant to a written contract dated October 19, 1950, as extended by a written agreement of July 22, 1952 (R. 3-5). Jurisdiction of the District Court was invoked under 28 U. S. C. 1332 (a) (2); the controversy exceeds the sum of $3000 exclusive of costs and interest and is between a Mexican corporation and a citizen of the State of Illinois (R. 4). Petitioner filed its answer and counterclaims, charging that respondent had breached its written contract with petitioner and had further breached an oral agreement to bread one million pounds of shrimp annually for petitioner (R. 517; 14-17). The issues were tried before a jury (R. 57). At the close of all the evidence the court granted respondent's motion to strike the breaded shrimp counterclaim (R. 392; 400-1; 403). At the same time, the court reserved its rulings upon motions for directed verdicts filed by both respondent and petitioner (R. 675; 666-7; 677-8). The jury was unable to reach a verdict (R. 688). Thereafter, the court granted respondent's motions for directed verdicts on the complaint and counterclaim and denied petitioner's motions (R. 707). The court, accordingly, entered judgment against petitioner for $210,878.29 plus interest in the amount of $18,215.09 (R. 708). The Court of Appeals affirmed that money judgment; that Court did, however, reverse the District Court's earlier order denying petitioner the right to file an amended answer and counterclaim based upon alleged violations of the Clayton and Sherman Antitrust Acts, and did direct the District Court to determine the antitrust issues (Appendix, *infra*, p. 30).

Respondent is a Mexican corporation engaged in the business of purchasing, freezing, packing, and distributing shrimp (R. 97-8). Petitioner is an Illinois resident engaged in the frozen foods business (R. 205). On October 19, 1950, respondent and petitioner executed a written

contract pursuant to which respondent was obligated to deliver to petitioner for sale by petitioner all of its production of shrimp through August 15, 1951, with the exception of shrimp sold for consumption in Mexico, provided that such domestic consumption was not to exceed 10% of the total production unless the laws of Mexico required otherwise. Petitioner agreed to distribute no Mexican shrimp other than respondent's shrimp and agreed to and did lend respondent $68,000. Petitioner further agreed to establish a letter of credit simultaneously with notification by respondent that it was prepared to ship a carload of shrimp. Each letter of credit was to cover 75% of the market value of the carload of shrimp delivered. Petitioner agreed to remit to respondent 93% of the price at which the shrimp was sold by petitioner, after deducting expenses paid or incurred by petitioner in connection with the transportation of shrimp from respondent to petitioner. Petitioner also agreed to remit any balances disclosed by monthly reports to be furnished to respondent. This contract was to expire on August 15, 1951; the contract was, however, subject to automatic renewal on a year to year basis (from August 16 of one year to August 15 of the next year) unless either party gave notice by March 1 to the contrary (Pltf. Ex. 1; R. 500-9).

On July 22, 1952, the parties executed an agreement extending the relationship for a two year term—that is, to August 15, 1954. This agreement modified the October 19, 1950 contract in that respondent was given the option of determining the method of financing. If petitioner furnished letters of credit, petitioner would continue to remit 93% of the price at which he sold the shrimp. If, however, respondent financed the transaction, petitioner was to remit 95% of the sales price. The extension agreement provided that, with these modifications, the terms of the prior contract would continue in effect (Pltf. Ex. 3; R. 511).

On February 25, 1953, respondent sent petitioner a telegram notifying petitioner that it was respondent's will to terminate its contract with petitioner as of August 15, 1953 (Pltf. Ex. 4; R. 512). The next day, February 26, 1953, petitioner wired respondent that the contract was not subject to cancellation until 1954 (Pltf. Ex. 5; R. 512). On March 5, 1953, respondent replied: "Replying your February 26 insist our notice cancellation contract if wish discuss point suggest you come Mexico City" (Def. Ex. 34; R. 556). Petitioner on March 6, 1953, wrote respondent a letter requesting an explanation of respondent's attempt to cancel and concluding: "I am sure that if there are any differences in the contract the Board of Directors wishes to discuss, we can reach an agreement without threats of cancellation" (Def. Ex. 5; R. 542-3). On March 12, 1956, respondent replied: "My personal interpretation on the letters and telegrams advising of the cancelling of the contract with Reno have no more object than to leave the new directors of Nacional Financiera in absolute liberty for the contracting for the distribution of shrimp by Reno, and not to give the impression it has formed an irrevocable contract for a long period." (Def. Ex. 5-A; R. 544).

Upon the giving of the cancellation notice, respondent through its general manager, Pedro Pinson, in March, 1953, began negotiations for the formation of a new plan of distribution for its shrimp (R. 212-3). Respondent was instrumental in forming a new Mexican organization called Exportadores Associados (hereinafter called "E.A."), the stock of which was owned by the shrimp producers of the West Coast of Mexico, including respondent (R. 119). The new plan further contemplated that the participating producers would contract to sell their entire production to E.A. and that E.A. in turn would cause an American corporation to be formed to distribute the shrimp in the United States

(R. 120-1, 214-5, 220, 226). The American corporation, Crest Importing Company (hereinafter called "Crest") was formed in June, 1953 and was owned entirely by E.A. (R. 211). E.A. would, of course, contract with Crest to sell its entire supply of shrimp to Crest (R. 121, 214, 220; Def. Ex. 8; R. 546-7).

As early as April, 1953, petitioner heard rumors concerning the new plan of distribution (R. 271). In June, 1953, petitioner sent Robert Appelbaum to Mexico. Robert Appelbaum was unable to dissuade respondent from its determination to cancel (R. 327-330). In July, 1953, Henry Appelbaum himself went to Mexico, where Pedro Pinson fully explained the new plan of distribution and handed to Appelbaum a letter suggesting the possibility of petitioner's handling of a territory under the "new organization to which we now belong" (R. 242; Pltf. Ex. 6, R. 513).

On August 24, 1953, respondent sent to petitioner a telegram stating that: "* * * There is no violation of our contract which was legally cancelled * * *" (Pltf. Ex. 9, R. 515). Petitioner answered by wire dated August 25, 1953, saying: "* * * our contract is in full force and effect until August 15, 1954. Again urge that you send authorized representative as you have often promised to do so that we can negotiate amicable settlement" (Pltf. Ex. 10; R. 516).

On September 24, 1953, the parties held two conferences at Chicago, Illinois. Present at these meetings were Henry Appelbaum, his son Robert, petitioner's attorney Stanford Clinton, John Willis, President of Crest, Oscar Fraustro, Chairman of respondent's Board of Directors and General Comptroller of Nacional Financiera, and Monroe Collenburg, New York attorney representing Nacional Financiera. Nacional Financiera is an agency of the Mexican government which is similar to the Reconstruction Finance Corporation and owned 75% of respondent's capital stock (R.

191, 161-2). At these conferences petitioner was offered a sub-brokerage under Crest or, in the alternative, settlement payments of $40,000. Petitioner rejected all of these overtures (R. 192-5, 199-200). Mr. Collenburg testified that at the end of the second conference, he asked Henry Appelbaum whether it was Appelbaum's position that he wanted respondent to perform the balance of its contract with him. Collenburg testified that Appelbaum replied "Yes that is it exactly" (R. 195). Appelbaum testified that he rejected offers of $25,000 and $40,000 and that at the end of the meeting Collenburg stated, "Well then, there is nothing left for us to do. Then I suppose we will have to go through with the contract." Appelbaum replied "That is all right with me, if I get assurance that they are going through with the contract" (R. 264-5). In that meeting the parties discussed the question of a guarantee of performance. Oscar Fraustro testified that he could not make such guarantee (R. 185).

On October 3, 1953, respondent wired petitioner that it "confirmed the extension letter July, 1952. Stop. Therefore contract remains in full force and vigor and directors hereby request payment to Bank America on or before Wednesday October 7, 1953 of all sums due as result your sales to date or shipments. Stop. Anticipate shipping first car around October 9th thus simultaneously payment Bank America open letter credit to cover this first shipment • • •" (Pltf. Ex. 12; R. 517). The payment requested related to shipments of cars 31 through 38 during the period October, 1952 to June, 1953. It is for the payment of these cars that respondent filed its action (Pltf. Ex. 17; R. 520).

On October 6, 1953 petitioner replied by telegram stating that "• • • inasmuch as you specify use of letters of credit assume you are returning to 7% commission arrangements. All this quite agreeable however in light of my recent experiences I am entitled to adequate security for

your performance. Puzzled by your direction of only one letter of credit when heretofore you have requested five or more at the opening of season. Nevertheless letter credit opened Banco Occidental at the following prices • • •" (Pltf. Ex. 13; R. 518).

On October 7, 1953, respondent wired petitioner as follows: "Commercial relations renewed under original contract and extension, your cable omits confirmation that required payment according to our previous cable has been made. We categorically demand it" (Pltf. Ex. 14; R. 518). On October 8, 1953, petitioner replied "We will continue to remit for cars as completely sold out in accordance with past practice so long as you live up to your agreement" (Pltf. Ex. 15; R. 519). On October 20, 1953, petitioner sent respondent a telegram stating that petitioner's failure to comply with respondent's wire of October 3rd was a most serious breach of contract, that respondent refused to send petitioner any more shrimp and that respondent demanded payment of any amounts due it (Pltf. Ex. 16; R. 519). The correspondence between the parties ended with petitioner's telegram of October 21, 1953. In that telegram petitioner stated "• • • your wire October 20 received. Not at all surprised as placed no reliance whatever in your promises to ship. Your entire conduct since February 25, 1953 proves conclusively that your continuous objective has been to evade the obligations of our contract. Our counsel advises us that we are now entitled to bring suit against you" Def. Ex. 3; R. 542).

Petitioner further adduced testimony and documentary proof to show the existence of an oral agreement entered into between respondent and petitioner in July, 1952. Under this agreement, which was to exist during the written agreements of October 19, 1950 and July 22, 1952 (Pltf. Ex. 1, 2; R. 500-509, 510), respondent was to bread one million pounds of shrimp per year and was to be paid its

cost plus four cents per pound profit. Although, pursuan to that agreement, petitioner sent the respondent a devein ing machine, as well as other supplies and equipment, re spondent did not ship any breaded shrimp to petitione (R. 278-300; Pltf. Ex. 51-71, 73-75; R. 633-657). At th end of petitioner's case, the trial court granted respondent' motion to strike the counterclaim based on this agreemen and to strike all portions of the testimony and all exhibit pertaining thereto (R. 400-1; 403).

REASONS FOR GRANTING THE WRIT.

1. The affirmance of the money judgment places the imprimatur of the Court of Appeals upon the following misstatement of evidentiary law by the District Court, now published at 138 F. Supp. 354 (R. 694 at 703):

> "* * * if it was counsel for the defendant's intention to prove a practice of making payment then it was incumbent on the defendant to prove this by direct testimony in his case in chief and not by admissions on cross-examination during the plaintiff's case. *Evidence elicited on cross-examination is not substantive evidence and cannot be used to prove an issue which must be proved with direct testimony by the party asserting it.*" (Emphasis added.)

The testimony referred to by the District Court was that elicited upon cross-examination of Pedro Pinson, who was a director and the general manager of respondent at the time of the occurrence of all matters pertinent to this case (R. 97-8, 112-14, 177-8). Pinson testified on cross-examination that after the extension agreement of July 22, 1952, the oral understanding of the parties was that petitioner was to remit to respondent for each carload of shrimp after it had been completely sold out (R. 118, 139, 147-8). On October 3, 1953, the date upon which respondent sent a telegram requesting petitioner to pay all sums due, the cars which were the subject of respondent's collection were not completely sold out and, therefore, payment for them was not yet due (R. 266-7; Def. Exs. 46, 47, 48, 49, 58; R. 562, 565, 568, 570, 572). Moreover, an oral agreement as to payment under the extension agreement was entirely in order because the original contract contained provisions only as to a letter-of-credit method of financing; the original contract contained no provisions as to payment

where respondent rather than petitioner financed the sales, and respondent financed the cars in question (R. 117-18; 141-3; Pltf. Ex. 1, R. 500-9; Pltf. Ex. 3, R. 511). Henry Appelbaum's testimony confirmed the oral agreement as to payment when the cars were sold out (R. 118, 139, 147-8, 234-5, 258).

There is no authority anywhere for the above-quoted statement of the District Court. The only rule of evidence which is even remotely similar to the court's statement is the rule that when a so-called "turncoat witness" changes his story, his prior inconsistent statements, while admissible for impeachment purposes, do not constitute substantive evidence of the facts contained in such previous statements, for the reason that the previous statements were not made under oath and were not subject to immediate cross-examination. 3 Wigmore, Evidence, § 1018; Annotation, 133 A. L. R. 1454; McCormick, The Turncoat Witness, 25 Tex. L. Rev. 573 (1947). However, in the present case the above rule has no application whatsoever. Pedro Pinson was not called as an adverse witness or otherwise by petitioner, but was called as a witness on behalf of respondent. For this reason alone the "turncoat witness" rule does not apply. Furthermore, Pinson testified as a representative and agent of respondent and his admissions were the admissions of respondent. Finally, the testimony referred to by the District Court did not consist of previous statements not under oath and not subject to further examination but was the actual testimony *under oath* by Pinson and subject to immediate further examination by respondent's counsel.

Not only is the testimony of a party or the party's representative elicited upon cross-examination admissible as substantive evidence against the party, but many courts and authorities heve held and stated that *such testimony absolutely binds the party giving such testimony.* Thus, according to some authority, Pinson's testimony would re-

quire that a directed verdict be entered on behalf of petitioner in this case. 9 Wigmore, Evidence § 2594 (a); Annotations 50 A. L. R. 979, 80 A. L. R. 624, 169 A. L. R. 798; McCormick, Handbook of the Law of Evidence, § 243, page 513 ff. But even assuming that Pinson's testimony was not binding upon respondent to the extent that it required the District Court to direct a verdict for petitioner, nevertheless under any view of this type of testimony, it constitutes substantive evidence which petitioner in this case was entitled to have presented to the jury for its determination.

In a case where the trial court directed a verdict for the plaintiff, as in the present case, *Bay Island Drainage District* v. *Nussbaum*, 388 Ill. 124 (1944), the Supreme Court of Illinois, in reversing and remanding, said at page 134:

> "First and principal of the questions raised is whether the court erred in directing a verdict for the plaintiff. In determining this question it is unnecessary to go at length into the evidence in the record, since such an issue depends upon whether the defendant presented any evidence which, when viewed in its aspect most favorable to the defendant can be said to have constituted evidence tending to support its claim that the proportion which plaintiff claims defendant should pay is too high. On a motion to direct a verdict, the unimpeached evidence of the party against whom the motion is directed must be accepted as true, and the most favorable interpretation and inference such evidence will bear must be given it, and, if there is any evidence tending to support the claim of the party against whom the motion is made, it is error to direct a verdict. (Citations). In considering a motion for a directed verdict courts cannot weigh the evidence but are required to resolve all controverted questions of fact in favor of the parties opposing the motion. (Citations). *In determining whether the court erred in directing a verdict, it is immaterial upon which side the evidence is introduced. If evidence introduced*

by either side, with its legitimate and natural inferences tends to establish the claim of the party opposing the motion, the motion should not be allowed." (Emphasis added.)

2. The District Court, in granting respondent's motions for directed verdicts and denying petitioner's motions after the jury was unable to agree, necessarily violated petitioner's constitutional right to have substantial fact issues tried by a jury (U. S. C. A. Const. Amend. 7); and the affirmance by the Court of Appeals can be justified only by completely disregarding pronouncements of the Supreme Court of the United States. In *Gunning* v. *Cooley*, 281 U. S. 90, 94 (1934) this Court said:

> "Issues that depend on the credibility of witnesses, and the effect or weight of evidence are to be decided by the jury. And in determining a motion of either party for a peremptory instruction, the court assumes that the evidence for the opposing party proves all that it reasonably may be found sufficient to establish and that from such facts there should be drawn in favor of the latter all the inferences that are fairly deducible from them."

To direct a verdict for a party in a case where there is conflicting evidence is to deprive the opposing party of his right to a trial by jury. In *Tennant* v. *Peoria and Pekin Union Railway Co.*, 321 U. S. 29, 35-6 (1944), the Court said:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility

> of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable * * * Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

In reaching its decision the District Court necessarily drew factual inferences unfavorable to petitioner, weighed the evidence and determined the preponderance of the evidence. The District Court further invaded the province of the jury by indulging in determinations respecting the credibility of witnesses. Several of the more salient examples of how the District Court judgment and opinion of the Court of Appeals have deprived petitioner of the constitutional right to a trial by jury shall be considered briefly:

(a.) The District Court avoided the testimony elicited on cross-examination of Pedro Pinson upon the alternative basis that Pinson "was entirely confused" (R. 703) and did not mean what he said. Thus, the District Court weighed qualitatively Pinson's testimony, which rightly should have been left to the jury. The Court of Appeals did not comment upon the misstatement of evidentiary law and disposed of Pinson's testimony by observing that "defendant's letter of July 22, 1952, referring to the extension agreement clearly demonstrates that no such practice existed" (Appendix, *infra*, p. 28). The document dated July 22, 1952, does not refer to the extension agreement but it is the extension agreement and it is not "defendant's letter" but "plaintiff's letter". Perhaps the Court of Appeals intended to refer to Penguin's letter of August 6, 1953 (R. 524 at 528). That letter is, at least, ambiguous; and the Court of Appeals has ignored the

testimony of Pedro Pinson, respondent's chief executive officer, to the contrary (R. 118; 139; 147-8) and the testimony of Henry Appelbaum (R. 234-5; 258), all of which proved that the practice of paying for cars only when sold out did exist. Under what possible theory can petitioner be deprived of a jury determination of this factual issue?

(b.) Both the District Court and the Court of Appeals held that respondent's telegram of February 25, 1953, constituted an anticipatory breach of contract but that respondent's telegram of October 3, 1953, was an effective withdrawal of that anticipatory breach (Appendix, *infra*, p. 28; R. 701). In concluding that the anticipatory breach was effectively withdrawn, both courts below ignored completely the primary fact upon which petitioner was entitled to a jury determination—whether respondent's action in "withdrawing" the breach was made in good faith.

The record is replete with evidence from which a jury could determine that respondent acted in bad faith. Respondent's general manager, Pedro Pinson, was one of the founders of the Crest E. A. plan of distribution (R. 128-9; 153; 212; 230). Pinson objected to the contracts between respondent and petitioner and urged the board of directors of respondent to terminate those contracts (R. 128-9). At about this time National Financiera, which owned 75% of the stock of respondent and was a large creditor and had the right to name two of its officers to the five-member board of directors of respondent, experienced a change in administration. (Def. Ex. 72; R. 591; R. 161-3, 248, 290). With this background the cancellation telegram was sent (Pltf. Ex. 4, R. 512). Petitioner resisted the attempted cancellation (Pltf. Ex. 5, R. 512).

Pinson then approached Willis with a definite plan for a new method of distribution of shrimp (R. 228, 231). The

plan was that respondent and other West Coast of Mexico shrimp producers would form a Mexican corporation known as Exportadores Associados (hereinafter called "E.A."), the stock in which would be owned by the producers (R. 119, 121-2, 150, 215). The participating producers would contract with E.A. to sell their entire production to E.A. (R. 120-1, 214-5, 220, 226). An American corporation, later known as Crest Importing Company, Inc. (hereinafter called "Crest") would also be formed, the entire capital stock in which would be owned by E.A. (R. 121; Def. Ex. 19; R. 555). E.A. would contract with Crest to sell its entire supply of shrimp to Crest (R. 121, 214, 220; Def. Ex. 8; R. 546-7). Negotiations between Pinson and Willis leading toward the information of E.A. and Crest began in March, 1953 (R. 212-3), shortly after the February 25, 1953 notice of cancellation to petitioner (Pltf. Ex. 4; R. 512).

Willis met Pinson in Mexico City in March, 1953 (R. 212-3) and Pinson asked him to take the job of forming and operating the E.A.-Crest method of distribution (R. 228, 231), which Willis accepted (R. 231-2). In July, 1953, contracts in the Spanish or Mexican language were prepared whereby respondent among other producers, bound itself to deliver its entire production for the 1953-4 season to E.A. for eventual disposition by Crest (R. 151-2, 214-5, 548). Respondent began to make preparations to sell its production to E.A. and then to Crest (R. 125).

Pinson and Willis were the leading figures in the formation of the E. A.—Crest was formed as a California corporation in June, 1953 with Willis as president and Pinson as a director and vice-president (R. 98, 121, 211-3, 213). Pinson at that time was also a director of E.A., having been a director since the formation of E.A. (R. 98, 121). Respondent owned 8 to 9% of the capital stock of E.A. (R. 122, 150), which in turn owned all of the capital stock

of Crest (Def. Ex. 19; R. 555). On August 3, 1953, Pinson was elected Chairman of the board of directors of Crest (R. 217). Crest and petitioner were, of course, competitors (R. 123-4).

In April, 1953 petitioner learned about the Crest-E.A. plan (R. 271). In June, 1953 Robert Appelbaum was told by Francisco Alcade, the chairman of the board of directors of respondent, that "in Mexico a contract doesn't mean anything"; that petitioner couldn't do anything about the wrongful cancellation of the contract; and that Pinson was undermining petitioner with respondent's board of directors (R. 327; 329). In July, 1953, Henry Appelbaum was told by the chairman of respondent's board of directors and by one of the directors that Reno was "*absolutely* committed to the (E.A.-Crest) deal and there is nothing anybody could do to change it" and that there was nothing anyone could do about it (R. 247-8).

On August 15, 1953, Crest opened up for business (R. 221). Meanwhile, Pinson had been promoted to chairman of the board of directors of Crest, but had remained as general manager of respondent (R. 217). From August 5 to 7, Pinson, Willis, and the chairman of respondent's board met with Bank of America officials to establish the financing of Crest (R. 228; Def. Exs. 78, 80, 82, 83; R. 598, 603, 604, 606).

On October 3, 1953, seven full weeks after the actual breach of contract and after almost seven and one-half months of insisting upon cancellation, respondent tersely advised petitioner, without any preliminary discussions, that it had *ex parte* decided that the "contract remains in full force and vigor and directors hereby request payment" on or before October 7, 1953, four days later (Pltf. Ex. 12; R. 517). It is important to note several circumstances which existed on October 3, 1953:

(1) Pinson, although still the general manager of

respondent (R. 150), remained, on and after October 3, 1953, a director of E.A. (R. 150) and a director and, in fact, chairman of the board of directors of Crest (R. 150, 217), petitioner's competitor (R. 123-4). On and after October 3, respondent itself remained a shareholder of E.A. and had not sold nor disposed of its shares in E.A. (R. 150), which, in turn, owned all of the stock in Crest (Def. Ex. 19; R. 555), petitioner's competitor.

(2) Respondent never had an office or agent in the United States available for service of process in the event it become necessary for petitioner to sue the respondent for damages for breach of contract (R. 149).

(3) *The contract* between E.A. and Crest, which had been written in Spanish or Mexican in July, 1953 and which had committed respondent to deliver its entire production to E.A. for eventual delivery to Crest (R. 214-5, 548) *was written in English on or about November 23, 1954, more than one year after the present controversy developed and was dated back to October 5, 1953 to coincide conveniently with the October 3, 1953 date which had become important to Pinson in his dual role as chief officer of both respondent and Crest and both of whose boards of directors he obviously controlled (Def. Ex. 8; R. 546; R. 214, 219).* The English version did not include respondent as a party to the contract.

Under the circumstances, respondent's sudden, terse and unexplained message to the effect—"We have changed our mind; send money" could mean but one thing: "Send the money and that's the last you will ever see of us; you can sue us in Mexico to get the money back if you think you're entitled to it." This is the only possible conclusion at which petitioner or any juror or any reasonable man could arrive. If there could possibly be a scintilla of doubt as to respondent's bad faith, it was certainly dispelled by what occurred after October 3, 1953. Notwithstanding that petitioner opened two letters of credit totaling $60,000,

which exceeded the value of the car promised, respondent did not ship the car (R. 268; Pltf. Ex. 13, R. 518). In short, respondent never performed after October 3, 1953.

On October 21, 1953, respondent wired petitioner that "your failure to • • • pay • • • is most serious breach of contract on your part and we refuse to send you any more shrimp for resale • • •" (Pltf. Ex. 16; R. 519). *On the day before—October 20, 1953—respondent had already started to deliver shrimp to Crest as Penguin, or as any juror or as any reasonable man possessed of the facts which Penguin had, could have readily predicted would happen even if Penguin had sent some money (which was never owing) in accordance with the demand of October 3, 1953* (R. 154, 226-7).

Thus in order for the trial court to direct a verdict for respondent it was necessary for the court to determine the fact question that respondent was acting in good faith when it purported to "withdraw" its breach of contract. In order to find that respondent acted in good faith, *it was necessary for the court to draw all inferences against petitioner, to weigh the evidence and to determine its preponderance*, contrary to every principle of directing verdicts.

Since petitioner's defense to, and recoupment and set-off against, the complaint is based upon the same facts and theory as those relating to the counterclaim, everything said in this analysis of the record as it relates to the counterclaim also relates to the defense. Therefore the jury could, after considering those facts, have found for petitioner on the counterclaim and also for petitioner as to its defense to the complaint.

3. The Court of Appeals reached erroneous legal conclusions without discussion or citation of authority:

(a) The Court said (Appendix, *infra*, p. 28) that "the

record is devoid of evidence to prove Reno became bound by written contract or otherwise to sell its product to either E.A. or Crest." This statement by implication overrules a rule of law the existence of which no one seems heretofore to have denied and which is set forth in 1 Restatement of the Law of Contracts § 318, p. 475, to the effect that *apparent* impossibility constitutes a total breach of contract.

The evidence shows as strongly as one could expect to elicit evidence from adverse witnesses on cross-examination that respondent was a party to the Spanish contract, obligating respondent to deliver its complete production to E.A.-Crest, which made performance of respondent's contract with petitioner *actually* impossible and it cannot be presumed that petitioner was clairvoyant enough on October 3, 1953 or at any time prior thereto to know that in November, 1954, over a year later, a new written contract would be drawn, dated back to October 5, 1953, eliminating respondent as a party. Further evidence of the apparent impossibility is Pinson's own statement that in July, 1953, he "fully explained to Mr. Appelbaum the formation of E.A. and Crest" (R. 130) and Reno's letter dated July 17, 1953 (Pltf. Ex. 6, R. 513-4) which says in part:

> "• • • the new organization • • • will handle our production• • •." "• • • the new organization to which we now belong, the President of same Mr. John W. Willis • • •."

(b) In connection with the "breaded shrimp counterclaim" the court (Appendix, *infra*, p. 29) overrules without discussion or authority the rule of law set forth in 2 Williston on Contracts (Rev. Ed.) § 495, pp. 1441-2, 1444-5, to the effect that an oral contract is not subject to the statute of frauds if there is a *possibility* of performance within a year.

The undisputed evidence was that the oral bread contract was to run concurrently with the written contracts of October 19, 1950, and July 22, 1952 (R. 16, 30, Pltf. Exs. 1, 3; R. 500, 511). The written contracts provided that respondent would not be obligated to perform if the laws of Mexico prohibited the exportation of frozen shrimp (R. 500-1). Since there was a possibility that the written contracts could be terminated within a year by legislation in Mexico, it follows that performance under the oral contract could be completed within a year.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

STANFORD CLINTON,
ROBERT A. SPRECHER,
FRANK A. KARABA,
Counsel for Petitioner.

January 22, 1958.

APPENDIX.

1. Opinion of Court of Appeals.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

No. 11717 SEPTEMBER TERM AND SESSION, 1957

REFRIGERADORA DEL NOROESTE S.A., *Plaintiff-Appellee*, *vs.* HENRY APPLEBAUM, Doing Business as Penguin Frozen Foods, *Defendant-Appellant*. } Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

October 30, 1957

Before DUFFY, *Chief Judge*, and MAJOR and LINDLEY, *Circuit Judges*.

DUFFY, *Chief Judge*. Plaintiff will hereinafter sometimes be referred to by its trade name "Reno." Plaintiff brought this suit against defendant for sums alleged to be due under a contract for the sale of shrimp. Defendant answered and interposed several counterclaims. A jury was unable to agree upon a verdict. The trial court then granted plaintiff's previously made motion for a directed verdict; denied the motions made by defendant and entered judgment against defendant for approximately $210,000 plus interest.

Reno is a Mexican corporation engaged in the business of purchasing, freezing, packaging and distributing shrimp. Reno produced about one-eighth of the total production of West Coast of Mexico shrimp. Defendant is a resident of Illinois engaged in the frozen food business. He distributes shrimp throughout the United States and Canada.

On October 19, 1950, plaintiff and defendant executed a written contract under which plaintiff was obligated to deliver to defendant for sale, all of plaintiff's production of shrimp through August 15, 1951 with the exception of shrimp sold for consumption in Mexico.[1] Defendant agreed that he would not distribute Mexican shrimp other than that received from plaintiff and agreed to and did lend $68,000 to plaintiff. Defendant also agreed to establish a letter of credit simultaneously with notification by plaintiff that it was prepared and ready to ship a carload of shrimp. Each letter of credit was to cover 75% of the market value of the carload of shrimp delivered.

Under the contract defendant was to remit to plaintiff 93% of the price for which defendant had sold the shrimp after deducting all expenses paid or incurred by defendant in connection with the transportation of the shrimp. The contract also provided that on or before the 15th of each month, defendant was to deliver to Reno a report with specified information as to shrimp sold. Defendant agreed that simultaneously with the delivery of such report it would pay to plaintiff the balance due on all sales made by defendant "as disclosed by such report."

Under Clause 18 the contract would expire on August 15, 1951, and on August 15 of each succeeding year thereafter if the contract were renewed. Under this same clause the contract was to be automatically renewed for another

1. There were other conditions not material here giving effect to possible requirements under Mexican law.

year unless either party notified the other to the contrary by March 1st of each year.

On July 22, 1952, the parties executed an extension agreement which modified the terms of the original agreement. By this modification the term of the contract was extended for two years and the plaintiff was given the option whether or not defendant was to furnish letters of credit. If defendant did furnish letters of credit defendant would continue to remit 93% of the sale price of the shrimp, otherwise defendant was to remit 95%.

On February 25, 1953, Reno sent defendant a telegram stating it was Reno's will to terminate the contract and stating the contract by its terms would thus end on August 15, 1953. Defendant promptly wired Reno that the contract was not subject to cancellation until 1954. Then followed an exchange of letters and telegrams in which Reno insisted the contract was canceled and defendant insisted that the contract remained in full force and effect until August 15, 1954.

Upon giving the cancellation notice, Reno, through its General Manager, Pedro Pinson, began negotiations for the formation of a new plan of distribution of its shrimp. Reno was instrumental in forming a Mexican organization called Exportadores Associados (hereinafter called E.A.) which consisted of five West Coast of Mexico shrimp producers whose combined production amounted to approximately one-fourth of the total production of West Coast of Mexico shrimp. These producers, including Reno, were stockholders in E.A. In June, 1953, an American corporation called Crest Importing Company, with headquarters at San Diego, California, was formed. This corporation was owned entirely by E.A.

A contract was executed on October 3, 1953 between E.A. and Crest whereby E.A. was to sell and Crest was to pur-

chase all of E.A.'s production of shrimp. All of the stockholders of E.A. except Reno had previously agreed to sell their entire production to E.A.

On September 24, 1953, upon demand of the defendant, conferences were held in Chicago in an endeavor to reach an amicable settlement. Among those attending were defendant, his son and attorney; John Willis, President of Crest, and Oscar Fra istro, chairman of Reno's board of directors, and general comptroller of Nacional Financiers which is an agency of the Mexican government and owned 75% of Reno's stock. Reno offered defendant a subbrokerage under Crest, and in the alternative offered to make settlement payments of $40,000. Defendant refused these offers and made counter offers which were rejected by Reno.

On October 3, 1953, Reno sent a telegram to defendant admitting the contract was in full force and effect. Reno demanded payment on or before October 7, 1953 of all sums due as a result of previous shipments of shrimp. The payment requested related to the shipment of cars 31 through 38 during the period from October, 1952 to June, 1953. The telegram also stated that plaintiff anticipated shipping the first car of shrimp about October 9th and instructed defendant to open a letter of credit to cover same. In a covering letter Reno stated any further delay in making payment might result in Reno's financial failure.

Defendant replied by telegram dated Octobe 6, 1953, wherein defendant stated that in the light of his recent experience with plaintiff he was entitled to adequate security for plaintiff's performance. Defendant also stated he was puzzled at plaintiff's direction to open only one letter of credit when plaintiff had previously requested five or more at the opening of the season.

By telegram dated October 8, 1953, defendant stated he would continue to remit for cars as they were "completely sold out in accordance with past practice so long as" plaintiff lived up to the agreement. On October 20, 1953, plaintiff telegraphed that it considered defendant's failure to make payment as requested in plaintiff's telegram of October 3 to be a most serious breach of contract. Plaintiff further stated that because of defendant's breach it refused to ship him any more shrimp. Defendant then was instructed to make payment as directed to the First National Bank of Chicago and to deposit with that bank all warehouse receipts covering plaintiff's shrimp that defendant had not sold. Thereafter, this suit was filed seeking payment for cars 31 through 38 which were shipped to defendant during the 1952-1953 season. Defendant filed an amended counterclaim alleging that plaintiff had breached the contract as a result of which defendant suffered damages well in excess of the amount of plaintiff's claim.

On November 10, 1954, defendant filed a counter-claim alleging the breach by plaintiff of an oral agreement whereby plaintiff agreed to undertake the breading of one million pounds of shrimp yearly. On June 3, 1955, four days before the date set for the commencement of trial, defendant sought to file instanter, an amendment to his amended answer and counterclaim, setting forth a claim based upon alleged violation by plaintiff of the Clayton and Sherman Antitrust Acts. The Court denied leave to file such amendment.

We agree with defendant's contention that the plaintiff's telegram of February 25, 1953 was an anticipatory breach of contract. Plaintiff desired to terminate the contract apparently believing it had the legal right so to do. However, after being advised by American counsel that the contract was in force until August 15, 1954 and could not

be terminated on August 15, 1953, plaintiff promptly notified defendant that the contract was in full force and effect.

The Mexican shrimp season runs from October to July of the following year. At no time had plaintiff shipped shrimp to defendant prior to the month of October. We agree with the trial court that plaintiff's telegram of October 3, 1953 had the effect of restoring the contract to full validity. Plaintiff's anticipatory breach was effectively withdrawn before plaintiff's duty of immediate performance arose.

Defendant argues that plaintiff's notice of intent to perform was ineffective because plaintiff could not then perform due to commitments with E.A. and Crest. Again we agree with the trial court that the record is devoid of evidence to prove Reno became bound by written contract or otherwise to sell its product to either E.A. or Crest.

Defendant next contends he was under no duty to pay plaintiff on October 3, 1953 because, according to a practice followed by the parties, payment for each car of shrimp became due only after that car had been completely sold out. However, defendant's letter of July 22, 1952 referring to the extension agreement, clearly demonstrates no such practice existed. The written contract obligated defendant to pay plaintiff for all shrimp which the monthly report revealed were sold during the preceding month. The trial court was correct in holding that proof had not been made of an agreement to vary that condition of the written contract.

The fact is defendant refused to pay for the shrimp because he was fearful that after Reno received the remittance for the amount past due it would then refuse to make further shipments of shrimp. Defendant was, of course, faced with a very practical problem. He could not obtain service of process on Reno, a Mexican corporation. He desired to withhold funds as a club to compel Reno to continue shipping carloads of shrimp to him. But by thus

refusing to pay for the amounts past due he breached the contract and Reno was legally entitled to terminate the contract and to sue for the balance due.

We hold the District Court was correct in granting plaintiff's motion for a directed verdict which had been taken under advisement pursuant to Rule 50 (b), Federal Rules of Civil Procedure. We agree with the determination of the trial court that as a matter of law defendant's refusal to pay for the shrimp it had received from Reno was a breach of contract entitling plaintiff to bring this suit. The judgment entered for plaintiff in the sum of $210,878.29 was proper.

Defendant asserts error because the court, at the close of defendant's case, struck the so-called "breaded shrimp counterclaim." Defendant alleged an oral agreement whereby Reno agreed to bread shrimp for defendant at four cents a pound. Plaintiff was to furnish all necessary labor and defendant was to furnish all cartons, labels and breading material. Plaintiff alleged the agreement was to continue until the written contracts for unbreaded shrimp had terminated.

The trial court held on the undisputed evidence that as the alleged oral contract was to run concurrently with the written contracts of October 19, 1950 and July 22, 1952, this would be contrary to the Illinois Statute of Frauds (Ill. Rev. Stat. 1955, c. 59, § 1) which provides that "no action shall be brought * * * upon any agreement that is not to be performed within the space of one year from the making thereof * * *." We hold the trial court was correct in dismissing this counterclaim.

Defendant further contends the trial court erred in rejecting certain exhibits. We find no reversible error in this respect.

Defendant complains of orders of the trial court as to matters of pretrial discovery. We do not find any prejudice to defendant in these rulings.

On June 3, 1955, defendant sought leave to file instanter an amendment to his amended answer and counterclaim, alleging plaintiff had entered into a combination, conspiracy and monopoly in violation of the Clayton and Sherman Antitrust Acts. The trial of this cause had been theretofore set for June 7, 1955. Clearly the trial court acted within its discretion in not permitting the trial of the main cause to be postponed until after such time as plaintiff had filed its rsponsive pleading. However, it was not necessary that the trial of the main cause be postponed as the court could have permitted the filing of the amendment and ordered a separate trial thereon.

The motion to file was accompanied by an affidavit stating that "within the past few weeks, counsel for defendant learned additional facts which they believe constitute a further cause of action. * * *" Counsel claims to have obtained this information while taking depositions in Mexico. He returned to the United States from that trip on May 24, 1955.

Rule 15(a) Federal Rules of Civil Procedure provides that leave to amend shall be freely given when justice so requires. By refusing to permit the amendment to be filed, defendant was, in fact, denied his day in court. Plaintiff is a Mexican corporation and it seems to be conceded, is not available for process anywhere within the United States. Under the circumstances of this case, we hold the denial of the motion to file this answer and counterclaim, was error. An order should be entered permitting such filing and giving plaintiff an appropriate time to file an answering pleading. The order should then provide for a separate trial upon the issues thus raised. The trial court, in its discretion, could withhold execution on the judgment which we have herein affirmed, until such time as the antitrust issues have been determined.

AFFIRMED in part, REVERSED in part.

2. Judgment of Court of Appeals.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

Chicago 10, Illinois.

Wednesday, October 30, 1957.

Before:

Hon. F. Ryan Duffy, Chief Judge.
Hon. J. Earl Major, Circuit Judge.
Hon. Walter C. Lindley, Circuit Judge.

REFRIGERADORA DEL NOROESTE S. A., *Plaintiff-Appellee,*

No. 11717 *vs.*

HENRY APPELBAUM, doing business as PENGUIN FROZEN FOODS, *Defendant-Appellant.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED in part and REVERSED in part; and that this cause be, and the same is hereby remanded to the said District Court for further proceedings in accordance with the Opinion of this Court filed this day.

It is further ordered and adjudged by this Court that the costs in this Court be divided equally between the Plaintiff-Appellee and the Defendant-Appellant.

3. Order Denying Rehearing.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

Chicago 10, Illinois.

Tuesday, December 3, 1957.

Before:

Hon. F. Ryan Duffy, Chief Judge.
Hon. J. Earl Major, Circuit Judge.
Hon. Walter C. Lindley, Circuit Judge.

REFRIGERADORA DEL NOROESTE S. A.,
Plaintiff-Appellee,

No. 11717 *vs.*

HENRY APPELBAUM, doing business as PENGUIN FROZEN FOODS,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 740

HENRY APPELBAUM, Doing Business as PENGUIN FROZEN FOODS,

Petitioner,

vs.

REFRIGERADORA DEL NOROESTE S. A.

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF IN OPPOSITION.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No. 740

HENRY APPELBAUM, Doing Business as PENGUIN FROZEN FOODS,

Petitioner,

vs.

REFRIGERADORA DEL NOROESTE S. A.

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF IN OPPOSITION.

OPINIONS BELOW, JURISDICTION AND STATUTE INVOLVED.

The opinions below, jurisdictional requisites and statute involved are adequately set forth in the petition.

QUESTIONS PRESENTED.

Stripped of conclusions and argument, the questions raised by the petition are:

1. Whether there was sufficient evidence to go to the jury with respect to the petitioner's contentions that:

(a) Petitioner was not in default in making payments under the contract because of an alleged practice or oral agreement that he was not required to pay for any portion of a car of shrimp until he had resold the entire car.

(b) The withdrawal by respondent of its anticipatory breach was not in good faith.

2. Whether a separate oral contract for the breading of shrimp alleged by petitioner was barred by the Illinois Statute of Frauds.

STATEMENT OF THE CASE.

This case is an action by respondent to recover for eight carloads of shrimp sold to petitioner. From October of 1950 until October of 1953, respondent, a Mexican shrimp packer, shipped substantially all of its production to petitioner. Relations between the parties were governed by a written contract which, as extended in 1952, provided, among other things, that petitioner was to report monthly the amounts of shrimp resold and simultaneously remit to respondent either 93% or 95% of the price which he obtained (R. 504, 511). It was 93% when petitioner financed the shipment and 95% when he did not (R. 511).

The 1952 extension also extended the operation of the basic contract until 1954 (R. 511). Otherwise, either party would have been free to terminate as of August 1953, by notice to the other prior to March 1, 1953 (R. 508).

Prior to March 1, 1953, respondent gave notice to petitioner that their contract would terminate "in accordance to its clauses" the following August (R. 512). This notice was sent on the advice of respondent's Mexico City attorneys (R. 124). However, respondent continued to per-

form under the contract and petitioner received, through July of 1953, the balance of respondent's production for the 1952-1953 shrimp season (R. 101). This season runs from some time in October to mid-July of the next year (R. 98, 311).

After receiving the termination notice, petitioner consistently claimed that, under the 1952 extension, the contract could not be terminated prior to 1954 (R. 512, 515-16). Respondent's position was that the notice of termination had been authorized and was legal (R. 139, 512, 515).

After sending the termination notice, respondent participated in the formation of a Mexican corporation called Exportadores Associados (EA) (R. 271). EA was owned by respondent and four other producers who represented about 20% of the production from the west coast of Mexico (R. 119, 120). Respondent owned 8% or 9% of the EA stock (R. 150). A wholly-owned American subsidiary, Crest Importing Company (Crest), was organized in June of 1953 (R. 211). As the District Court found (R. 702), respondent's plans with EA and Crest were "long range" and no commitments inconsistent with petitioner's contract were made by respondent (R. 170).

In April of 1953, petitioner heard rumors of the EA-Crest plans (R. 271). As stated in petitioner's statement (at p. 7), he sent his son (R. 327), Robert Appelbaum, to Mexico in June, and in July went himself. The general manager of respondent, Pinson (R. 97) then fully explained to petitioner the EA-Crest plan (R. 130). In August 1953, petitioner demanded that respondent send an authorized representative to Chicago to negotiate a settlement of the differences with respect to the termination notice (R. 515, 516).

In the meantime, in June and July 1953, petitioner had received the eight cars of shrimp for substantially all of which he has refused to pay (R. 15). A small payment on account of sales by respondent from these cars had been made in June, but nothing in July or August (R. 520).

In September of 1953, respondent's American attorney, Colienburg, advised that petitioner had been correct in his insistence that the contract between the parties had another year to run (R. 223). On the other hand, petitioner had admitted to an official of respondent that he had retained funds due respondent to compel respondent to send a representative to negotiate with him (R. 164).

Later in September, 1953, the parties, their attorneys and the President of Crest met in the petitioner's office and attempted to settle their differences. Petitioner testified that after he turned down an offer of $40,000 to step out of the contract, respondent's attorney said:

"Well then, there is nothing left for us to do. Then I suppose we will have to go through with the contract." And petitioner replied:

"That is all right with me, if I get assurance that they are going through with the contract * * * that they were sincere in their offer." (R. 265).

After the September meeting, respondent notified petitioner that its Board of Directors had confirmed the extension agreement and asked him to remit all sums due (R. 517). It was thus clear that respondent intended to go on with the contract and any anticipatory breach was unequivocally withdrawn. Petitioner replied he was gratified at the acknowledgment of responsibility under the contract but ignored the request for payment, saying:

"I am entitled to adequate security for your performance" (R. 518).

To respondent's next demand for payment, petitioner replied:

"We will continue to remit for cars as completely sold out in accordance with past practice so long as you live up to your agreement" (R. 519).

Respondent then, on October 20, 1953, declared the contract terminated because of petitioner's refusal to pay in accordance with its terms, and in December 1954 filed its complaint to recover for the eight carloads of shrimp.

REASONS FOR NOT GRANTING THE WRIT.

I.

No Ground For Certiorari Is Shown.

Entirely apart from the invalidity of petitioner's contentions, this case is clearly not appropriate for certiorari. No substantial or important federal question is presented and petitioner relies on no conflicting decisions of any courts, either state or federal. Although petitioner has claimed an infringement of his right to a jury trial under the Seventh Amendment (Petition, pp. 2, 14, 15 and 16), it is clear that the direction of a verdict—even if erroneous—does not present a constitutional question for this Court to consider. See *Galloway* v. *United States*, 319 U.S. 372, 373 (1943); *Baltimore & C. Line* v. *Redman*, 295 U.S. 654, 659 (1935); and dissent of Justice Holmes in *Slocum* v. *New York Life Ins. Co.*, 228 U.S. 364, 401 (1913). Furthermore, that both courts below have considered the facts and decided against petitioner should be determinative here. *Leach* v. *Burr*, 188 U.S. 510, 513 (1903); *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949).

Applying well-settled principles of contract law, which petitioner does not question, both of the courts below properly held that petitioner's insistence that respondent's February, 1953, notice of termination was inoperative en-

abled respondent to withdraw it, obligated petitioner to perform in turn, and, when he refused to pay, respondent properly terminated the contract. *Roehm* v. *Horst*, 178 U.S. 1, 11 (1900); *Kentucky Natural Gas Corp.* v. *Indiana Gas & Chemical Corp.*, 129 F.2d 17, 19, 20 (C.A. 7, 1942, cert. den. 317 U.S. 678); *Reliance Cooperage Corp.* v. *Treat*, 195 F.2d 977, 981, 982 (C.A. 8, 1952).

II.

The Petition Fails to Show Any Error Below and Contains Major Misstatements of the Record.

A. As one reason for granting the writ, petitioner argues that the Court of Appeals, by affirming, puts its "imprimatur" on what petitioner claims was a misstatement of the law of evidence by the District Court (Petition, p. 11). However, the Court of Appeals did not even find it necessary to refer to this point and *obiter* of the District Court, even if erroneous, could hardly be the basis for certiorari.

But what petitioner actually is arguing that there was sufficient evidence to go to the jury on his claim that there was either an "oral understanading" or "agreement" (Petition, pp. 11, 12) or a "practice" (Petition, p. 16) that no payment was due for any part of a car until petitioner had resold the entire carload, and thus no payment was due upon respondent's demands in October 1953 because the eight cars delivered in June and July were not completely sold out.

Both courts below correctly held that the written contract and 1952 extension required a monthly accounting (Petition, p. 28; R. 703); thus, contrary to the assertion of petitioner (Petition, p. 11), any contemporaneous oral agreement to the contrary was not "in order" and, as the District Judge ruled (R. 704), whatever the "practice",

respondent on notice might properly insist, as it did, on payment in accordance with the contract.

Furthermore, that petitioner inconsistently urges the identical testimony (R. 118, 139, 147-48, 234, 235, 258) supports both his "oral agreement" and "practice" theories (Petition, pp. 12 and 16) cannot obscure the fact that neither is supported by the record. These unjustified arguments are obviously after-thoughts concocted in desperation since, when petitioner answered respondent's first request for payment (R. 517), justification for non-payment was not predicated on the theory that no payment was due because of past "practice" or an "oral agreement", but rather on the ground that petitioner felt himself "entitled to adequate security" (R. 518).

Petitioner's testimony is said to confirm "the oral agreement as to payment when cars were sold out" (Petition, p. 12). However, that testimony (R. 234, 235, 258) is barren of any reference whatsoever to the asserted "oral agreement" and does not even suggest that the "practice" referred to was not in accordance with the contract which required monthly remittances (R. 504). In any event, the testimony related to a time *prior* to the February, 1953* notice of termination *after* which it is clear that payments were made long before an entire car was resold. This is clearly shown in petitioner's last accounting and remittance which was made on June 30, 1953 and included a small

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* For example,

"Q. And prior to the receipt of the notice of cancellation from Reno in February of '53, what had been the practice with respect to remitting payment for the shrimps since 1952, the date which you started operating under the extension agreement?

"A. We remitted to the First National Bank as the cars were sold out and the money collected from the sales." (R. 258).

payment for sales from cars which were not completely sold out until many months later (R. 520, 566, 571, 573). The interpretation sought to be placed on petitioner's testimony is also directly contradicted by a letter written by petitioner to respondent on August 6, 1953, in which he stated:

". . . if you will check your records, I sincerely doubt if you will find more than a few cases where we failed to pay the bank for any car before it was completely sold out." (R. 528).

Petitioner also claims that the testimony of respondent's General Manager, Pinson (R. 118, 139, 147-48), supports his claim of a "practice" or "understanding" (Petition, pp. 11, 12, 13, 15, 16). Petitioner does not quote even a portion of this testimony because, as appears from the pages cited, it consists of affirmative responses to various obscure questions not one of which even suggested a "practice" of payment at variance with the contract. Nor was there a single question addressed to Pinson regarding the "oral agreement" referred to by petitioner. However, when details regarding payment were sought, Pinson said "I don't remember" (R. 148). This is not surprising since, as petitioner himself testified, Pinson was only concerned with the "physical delivery" of shrimp (R. 247, 248).

B. Petitioner's argument that there was sufficient evidence of respondent's "bad faith" in withdrawing its anticipatory breach to present a jury question (Petition, p. 16) rests on four important misstatements of the record.

1. Attempting to show that respondent did not intend to perform, petitioner claims that contracts in Spanish were prepared in July 1953, whereby respondent bound itself to deliver to EA for the 1953-54 season (Petition,

pp. 17, 19). However, the testimony, even that relied on by petitioner, is plain that respondent did not so bind itself (R. 120-21, 151-53, 214-16), and was not even mentioned in the so-called Spanish contract (R. 215, 216).

2. Although it is not clear how it would relate to petitioner's "bad faith" argument, even if true, he asserts that in October 1953 respondent "tersely advised petitioner, without any preliminary discussions, that it had ex parte decided that the 'contract remains in full force and vigor • • •'" (Petition, p. 18). This, of course, is false since there were extensive discussions between the parties in September 1953 and respondent then, on the advice of counsel, clearly stated it would go on with the contract (*supra*, p. 4, Petition, pp. 7, 8).

3. Crucial to petitioner's "bad faith" claims is the unsupportable assertion that Pinson, the General Manager of respondent "obviously controlled" the boards of directors of both respondent and Crest (Petition, p. 19). However, the undisputed evidence with respect to respondent is that the Comptroller General of Nacional Financiera, which owned 75% of respondent's stock (R. 162), was handling respondent's affairs (R. 328), the 1952 extension agreement came to being despite Pinson's objections (R. 129), and he ceased to be a director of respondent four days before the contract with petitioner was finally terminated (R. 578). With respect to Crest, the facts are that although Pinson bore the title of Chairman of the Board, the function of this official was merely to preside at meetings of the Board (R. 217), and Willis, the President and active executive of Crest, did not even know until the trial that the office of Chairman of the Board existed (R. 217).

4. The final and most flagrant misrepresentation of petitioner in support of his unfounded claim of "bad faith"

is the statement that respondent started to ship to Crest the day before it declared a breach for petitioner's failure to pay (Petition, p. 20). Here petitioner simply changes the date of respondent's termination wire of October 20 to October 21! Although no date appears on the exhibit itself (R. 519), it is apparent from petitioner's answering wire (R. 542), repeated statements by his counsel at the trial (R. 461, 474, 478, 482) and his petition (p. 9) that the correct date is October 20.

These gross inaccuracies are inexcusable and would justify dismissal of the petition (Rule 23(4)).

C. Petitioner also claims, on the basis of his "Spanish contract" theory, that it was apparently impossible for respondent to perform and that the Court of Appeals, by not adopting this theory, "overruled" the Restatement of Contracts §318, p. 478 (Petition, p. 21). This argument ignores the findings of both courts below (Petition, p. 28, R. 702) that there was no evidence respondent was a party to any such contract and overlooks the rule that apparent impossibility is merely a form of anticipatory breach subject to withdrawal (Restatement of Contracts §318, p. 475).

D. The argument of petitioner with respect to the Illinois Statute of Frauds point (Petition, pp. 20, 21) merely raises a question of Illinois law and advances the untenable proposition that a provision temporarily suspending performance upon a certain contingency of a contract of more than a year's duration shows a possibility of termination within a year.

In any event, the District Court, in dismissing this counterclaim, also ruled there was not sufficient evidence to establish the existence of the alleged oral contract R. 400-401).

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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